United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF AND APPENDIX FOR APPELLANTS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED MAY 19 1958
Joseph W. Stewart
CLERK

No. 14,400

JAMES GASTON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 14,401

65

JOSEPH ROBINSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WESLEY S. WILLIAMS
620 Fifth Street, N. W.
Washington 1, D. C.
Attorney for Appellants

Washington, D. C. ROBERT I. THIEL Printer EX 3-0625

STATEMENT OF THE QUESTION PRESENTED

The sole question presented by the appellants on this consolidated appeal is as follows: Is adequate probable cause for the issuance of a search warrant for a dwelling established by an affidavit which states that "known and convicted" numbers operators frequent the premises, without more?

INDEX

	Page
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	4
STATEMENT OF POINTS	4
SUMMARY OF ARGUMENT	5
ARGUMENT	5
Prejudicial Error Was Committed When Items Seized Pursuant To The Search Warrant Issued In This Case Were Admitted Into Evidence Over Objection Of Defense Counsel	5
CONCLUSION	9

TABLE OF CASES

Beard v. United States, 65 U.S. App. D.C. 231	7, 8
Brinegar v. United States, 338 U.S. 160	7, 8
Carroll v. United States, 267 U.S. 132	8
Johnson v. United States, D.C.D.C., 113 F. Supp. 359	6
Mills v. United States, 90 U.S. App. D.C. 67	7, 8
Rabinowitz v. United States, 339 U.S. 56, 63	6
Schenks v. United States, 55 U.S. App. D.C. 84, 85	6
Washington v. United States, 92 U.S. App. D.C. 31	8
Wyche v. United States, 90 U.S. App. D.C. 67	7

STATUTES INVOLVED

Fourth Amendment, United States Constitution	3
Title 28, U.S. Code, Section 1291	2
Rule 37, Federal Rules Criminal Procedure	2
D.C. Code, as amended, Title 22-1501, 1502, 1505	2, 3

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF AND APPENDIX FOR APPELLANTS

JURISDICTIONAL STATEMENT

This is an appeal, consolidated for hearing in this Court, brought by the appellants from the judgment and sentence imposed by the Court, after trial by a jury before the Honorable Judge Luther W. Youngdahl,

United States District Court for the District of Columbia, in which the jury found the appellants guilty on all counts under which they were indicted. The appellants were each sentenced to one to three years on the lottery count, one year on the possession count, one year on the gambling table count, these sentences to run concurrently by the counts; and each defendant was fined one thousand dollars on the gambling tax stamp count, execution of this sentence as to each defendant as to payment of the fine suspended.

The jurisdiction of this Court is invoked under Section 1291, Title 28, U. S. Code, and Rule 37, Federal Rules of Criminal Procedure.

STATUTES INVOLVED

Section 22, 1501, D.C. Code, Lotteries - Promotion - Sale or Possession of tickets.

If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy, lottery, or any lottery, or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy or shall for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than $1,000, or be imprisoned not more than three years, or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima facie evidence

that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery.

Section 22, 1502 D. C. Code, Possession of lottery or policy tickets.

If any person shall, within the District of Columbia, knowingly have in his possession or under his control, any record, notation, receipt, ticket, certificate, bill, token, slip, paper, or writing, current or not current, used or to be used in violating the provisions of sections 863, 865, or 869 of this Act, he shall, upon conviction of each such offense, be fined not more than $1, 000 or be imprisoned for not more than one year, or both. For the purpose of this section, possession, of any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing shall be presumed to be knowing possession thereof.

Section 22, 1505, D. C. Code, Permitting gambling table or device to be set up. (Amended - which reads in part)

"(a) Any house, building, vessel, shed, booth, shelter, vehicle, enclosure, room, lot, or other premises in the District of Columbia, used or to be used in violating the provisions of section 863 or 965 of this Act, shall be deemed 'gambling premises' for the purpose of this section.

(b) It shall be unlawful for any person in the District of Columbia knowingly, as owner, lessee, agent, employee, operator, occupant, or otherwise, to maintain, or aid or permit the maintaining of any gambling premises."

UNITED STATES CONSTITUTION

Fourth Amendment to the Constitution:

The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall

not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On February 1, 1957, officers of the Metropolitan Police Department, armed with a search warrant for premises 215 Gallatin Street, N. W., Washington, D. C., and also an arrest warrant for the defendant, Joseph Robinson, executed said warrants by breaking in and searching said premises, seizing certain alleged numbers or lottery paraphernalia, searching the defendants who were found present at the time of the execution of said search warrant.

The supporting affidavit for the warrants purported to show that the defendants were engaged in a systematic course of conduct each day, frequenting and leaving the premises searched at times when it is alleged that lottery operations were being conducted by the defendants; that the defendant, Robinson, was allegedly followed and observed making his daily rounds, so to speak, and that he had in his possession the oft-referred to brown paper bags and bulging pockets. The defendant, Gaston, was also allegedly followed and observed arriving at and leaving certain alleged numbers premises carrying a large paper bag.

At the time of the execution of the warrants, both defendants were in the premises; the defendant, Gaston, allegedly claimed ownership of all paraphernalia found therein; the defendant, Robinson, made no statement whatsoever concerning his presence.

Defendants were arrested and charged with violations of the lottery statutes then and there in force in the District of Columbia.

STATEMENT OF POINTS

1. The search warrant, issued on the basis of the affidavit in this case was improvidently issued and was without probable cause, and the seizures made under the color thereof were illegal and the admission

into evidence of things seized pursuant thereto was prejudicial error.

SUMMARY OF ARGUMENT

1. The mere fact that suspected criminals visit a given premises will not in and of itself constitute probable cause for the issuance of a search warrant to seek evidence in those premises.

ARGUMENT

PREJUDICIAL ERROR WAS COMMITTED WHEN ITEMS SEIZED PURSUANT TO THE SEARCH WARRANT ISSUED IN THIS CASE WERE ADMITTED INTO EVIDENCE OVER OBJECTION OF DEFENSE COUNSEL.

Insufficiency of adequate probable cause to justify the issuance of the search warrant is claimed for the following reasons:

In challenging sufficiency of the affidavit to establish probable cause, complaint is immediately made about the use of such terms as "known" and "suspected" operators, which terms were credited with sufficient weight by the Court below to make the difference between "adequate probable cause" and "insufficient probable cause". In advancing this point, the appellants are aware that the Fourth Amendment to the Constitution prohibits only "unreasonable" searches, and that there is no fixed formula available for determining the reasonableness of a search. This latter is all important, because with or without a warrant, the test of legality of a search is whether or not it is reasonable. And in this connection, the only justification for a search is probable cause to believe that crime is or has been committed and that the fruits of the crime or instrumentalities used in committing it will be revealed by the search.

The recurring question of the reasonableness of searches must find resolution in the facts and circumstances of each case. United States v. Rabinowitz, 339 U. S. 56, 63.

Equally apparent is the fact that the formality of the issuance of a warrant to search is not enough to satisfy the constitutional requirements. The required affidavit in support of the application for the warrant must set out the "facts and circumstances", so that they may be tested for their sufficiency to show probable cause.

If some "known" or "suspected" or "positive" fact is required to raise the affidavit to the level of sufficiency, the affiant may not merely throw in the words "known", "suspected" and "positive", without exposing the operative facts to the critical eye of the judicial officer who sits in judgment and preliminary examination to determine the existence of probable cause.

It seems that since our highest Court has stated that the presence or absence of probable cause depends on the facts and circumstances in the particular case, that any fact or facts critical to the measure of probable cause should not be hidden from the scrutiny and examination of the Court making the appraisal. To allow this type of token compliance is to expose the public to zealous, suspicious and sometimes ruthless accusers. We should not lose sight of the admonition of our own Court of Appeals in Schenks v. United States, 55 U.S. App. D.C. 84, 85, when it stated that officers, while zealously endeavoring to bring law breakers to justice, unfortunately are easily satisfied as to the guilt of an accused.

It is obvious that without "known" or "suspected" or "convicted" that the Commissioner wouldn't have issued the warrant and it is more abundantly obvious that without these magic words the District Court would have applied the doctrine of its Johnson case, D.C. D.C., 1953, 113 F. Supp. 359, United States v. Johnson. It is perfectly apparent that the accusers in this case have again lifted themselves by their own boot-straps by using the words, "known", "suspected" and "convicted".

This situation strips our problem of all vagueness and presents the clean-cut question: Where observations alone are insufficient to establish probable cause unless cast in a particular frame of reference, can the indispensable frame of reference be furnished by the mere utterance of such words as "known", "positive information", etc. ? In other words the frame of reference necessary to complete the mosaic of probable cause necessarily must be the officer's knowledge of the primary and ultimate fact that the accused is engaged in criminal acts or that the premises are being used to conduct such activity. It makes no difference whether the officer's knowledge of the existence of criminal endeavor is based on his first-hand personal knowledge or on a type of information, but in any event he is required to set out in the affidavit those facts and circumstances which make for his knowledge. He can not just say "John Jones, known to me etc.,". He must outline the facts constituting the basis for his conclusion that he "knows" John Jones is in fact whatever he is alleged to be. There is no spot of authority on this proposition. And there is no case which holds to the contrary. This is urged upon the Court despite the contention of the Government that Mills v. United States, 90 U. S. App. D. C. 67; Beard v. United States, 65 U. S. App. D. C. 231; and Brinegar v. United States, 338 U. S. 160, held to the contrary.

Every single one of these cases has been meticulously examined and not one of them was based on belief or observation alone. These cases support our contention. In every one of them the officers were in possession of, and set out the facts constituting the information or the facts constituting their personal knowledge. Let us examine them. Take the Wyche case, Wyche v. United States, 90 U. S. App. D. C. 67, which we think has been cited for many propositions which it most certainly does not stand for. Surveillance during particular hours was not enough, but the results of the surveillance correlated with the information received and was "carefully checked by the officers." The most important thing in the Wyche case was that not only was the informant

who furnished the information before the Commissioner, but the information was set out in narrative fashion in affidavit form, along with the informant, and was presented to the Commissioner at the time application for the warrant was made; and if that weren't enough, the officers incorporated by reference the informant's affidavit which was based on personal experience and actually collecting the information acted upon.

In the Beard case, we had officers in an adjoining room to the race-horse headquarters who heard bets being made and received by way of phone, and heard descriptions of horse races over a telecast system. What more personal knowledge would they need to hitch their observations to?

In the Othello Washington case, Washington v. United States, 92 U.S. App. D.C. 31, in addition to observations, we had telephonic contact with the premises and inquiries made on the telephone relative to the numbers business and characteristic responses received by the officers.

In the Mills case, we had the make and year model of the suspected automobile, description of the man, and his itinerary furnished. The observations of the officers fitted into the information like the pieces of a jig-saw puzzle.

In Brinegar and Carroll, which seems to be the most frequently cited cases in support of decisions upholding searches and seizures - the officers' knowledge "of the primary and ultimate fact that the accused was engaged in liquor running" is emphasized. The Court gives painstaking effort to outlining the circumstances which gave rise to the agent's "knowledge of the primary and ultimate fact that the accused was engaged in crime". Then too, in the Brinegar case, the Court apparently felt the necessity of isolating the facts and circumstances making for this knowledge and comparing them with the facts and circumstances giving rise to this knowledge in Carroll v. United States, 267 U.S. 132. The inevitable conclusion after reading Brinegar is that

some knowledge of criminal endeavor must be present, independent of the officer's observations and investigation. In other words, the officer cannot depend upon his surveillance, etc., as a basis for his knowledge and then fit his continued observations, surveillance, etc., to that knowledge.

Here in this case, then, concluding the argument on the sole point raised by this appeal, we say that the defendants having made timely objection at the trial to the evidence seized on the basis and authority of the search warrant in this case, have been prejudicially aggrieved by the reception of the evidence against each of them.

This argument is not original and indeed has been urged upon this Court in many cases; counsel for these appellants states in all sincerity that in his judgment, this point raised on appeal is sound in law and should be seriously entertained by this Court. We are not unmindful that no formal motion was made pursuant to Rule 41(e), Federal Rules of Criminal Procedure, prior to trial, but it is urged that defendants' seasonable objection to the admission of the evidence seized on the authority of the search warrant suffices to save the point on appeal.

CONCLUSION

In conclusion, appellants submit to this Honorable Court that the Court below committed prejudicial and reversible error as to each; and therefore counsel respectfully urge that this Honorable Court reverse the verdict and judgment entered against appellants by the Court below.

WESLEY S. WILLIAMS
620 Fifth Street, N. W.
Washington, D. C.
Attorney for Appellants

INDEX

	Record Page	Appendix Page
Indictment	145	1
Verdict	149	2
Notice of Appeal of Joseph Robinson	150	3
Notice of Appeal of James Gaston	151	3
Judgment and Commitment of James Gaston	152	4
Judgment and Commitment of Joseph Robinson	153	4
Search Warrant		5
Return		6
Statement of Facts Relative to Request for United States Commissioner's Search and Arrest Warrants for the Premises and Persons Described Below for Violation of the Lottery Laws of the District of Columbia		7
Excerpts from Transcript of Proceedings	3	13
Witnesses:		
Tarver Thomas		
Direct	3	13
Cross	16	20
Redirect	22	23

APPENDIX FOR APPELLANT

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145 [Filed in Open Court Mar. 26, 1957]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled December 27, 1956, Sworn in on January 2, 1957

The United States of America	:	Criminal No. 307-57
v.	:	Grand Jury No. 261-57 262-57
Joseph Robinson James Gaston	:	Vio. 22 D. C. C. 1501, 1502, 1505 26 U. S. C. 7262

The Grand Jury charges:

Continuously during the period from about January 29, 1957 to about February 1, 1957, within the District of Columbia, Joseph Robinson and James Gaston were concerned as owners, agents and clerks, and in other ways, in managing, carrying on and promoting a lottery known as the numbers game.

SECOND COUNT:

On or about February 1, 1957, within the District of Columbia, Joseph Robinson and James Gaston knowingly had in their possession and under their control notations, records, receipts, tickets, certificates, bills, slips, tokens, papers and writings, current and not current, used and to be used in a lottery known as the numbers game.

THIRD COUNT:

Continuously during the period from about January 29, 1957 to about February 1, 1957, within the District of Columbia, Joseph Robinson and James Gaston did knowingly, as agents, employees, operators, occupants and otherwise, maintain, aid and permit the maintaining of a gambling premises located at 215 Gallatin Street, Northwest.

FOURTH COUNT:

Continuously during the period from about January 29, 1957 to about February 1, 1957, within the District of Columbia, Joseph Robinson

was engaged in the business of accepting wagers without having previously paid the special tax as required by Title 26, United States Code, Section 4411.

146 FIFTH COUNT:

Continuously during the period from about January 29, 1957 to about February 1, 1957, within the District of Columbia, James Gaston was engaged in the business of accepting wagers without having previously paid the special tax as required by Title 26, United States Code, Section 4411.

/s/ Oliver Gasch
Attorney of the United States in
and for the District of Columbia

A TRUE BILL:

/s/ Daniel L. Harbour
Foreman.

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149 [Filed Jan. 15, 1958]

On this 15th day of January 1958, came again the parties aforesaid, in manner as aforesaid, the same jury and alternate jurors as aforesaid in this cause the hearing of which was respited yesterday; whereupon the jury is charged, the alternate jurors are discharged; Jury accommodations ordered and issued whereupon the jury upon their oath find the defendants guilty as indicted.

The case is referred to the Probation Officer of the Court and the defendants are committed to the District of Columbia Jail.

Comm. (2) issued.

By direction of

Luther W. Youngdahl
Presiding Judge
Criminal Court #1

Present:

United States Attorney
By Flannery
Asst. United States Attorney

Kaitz & Doran
Official Reporters

HARRY M. HULL, Clerk

By /s/ John J. Flannery
Deputy Clerk

150 [Filed Feb. 21, 1958]

NOTICE OF APPEAL

Name and address of appellant: Joseph Robinson, 215 Gallatin St., N. W.

Name and address of appellant's attorney: Wesley S. Williams, 620 - 5th Street, N. W.

Offense: Operating Lottery

Concise statement of judgment or order, giving date, and any sentence:

1 - 3 yrs. J. Youngdahl, 2/21/58

Name of institution where now confined, if not on bail: D. C. Jail

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

2/21/58
Date

/s/ Joseph Robinson
Appellant

/s/ Wesley S. Williams
Attorney for Appellant.

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151 [Filed Feb. 21, 1958]

NOTICE OF APPEAL

Name and address of appellant:

James Gaston, 422 Kenyon St., N. W.

Name and address of appellant's attorney:

T. Emmett McKenzie
412 - 5th St. N. W.

Offense: Operating Lottery

Concise statement of judgment or order, giving date, and any sentence:

1 - 3 years J. Youngdahl, 2/21/58

Name of institution where now confined, if not on bail: D. C. Jail.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

Date: 2/21/58

/s/ James Gaston
Appellant

/s/ Wesley S. Williams
Attorney for Appellant

152 [Filed March 3, 1958]

JUDGMENT AND COMMITMENT OF JAMES GASTON

On this 21st day of February, 1958 came the attorney for the government and the defendant in person and by counsel, T. E. McKenzie, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of Violation of Title 22 Section 1501, 1502, & 1505 District of Columbia Code; Violation of Title 26 Section 7262 United States Code, as charged in the indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) year to Three (3) years on count one; One (1) year on count two; One (1) year on count three said sentence by the counts to run concurrently with each other; and to pay a fine of One Thousand ($1, 000. 00) Dollars on count five.

IT IS ADJUDGED that the payment of the fine be and is hereby suspended.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Luther W. Youngdahl
United States District Judge

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153 [Filed March 3, 1958]

JUDGMENT AND COMMITMENT OF JOSEPH ROBINSON

On this 21st day of February, 1958 came the attorney for the government and the defendant in person and by counsel, W. S. Williams, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of Violation of Title 22 Sections 1501, 1502 & 1505 District of Columbia Code; Violation of Title 26 Section 7262 United States Code, as charged in the indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) year to Three (3) years on count one; One (1) year on count two; One (1) year on count three said sentence by the counts to run concurrently with each other; and to pay a fine of One Thousand ($1, 000. 00) Dollars on count four.

IT IS ADJUDGED that the payment of the fine be and is hereby suspended.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Luther W. Youngdahl
United States District Judge

SEARCH WARRANT

United States of America)
)
v.)
)
Basement and entire premises)
215 Gallatin Street, N. W.)
Washington, D. C., occupied)
by Joseph Robinson)

TO The Chief of Police or any Officer of the Metropolitan Police, D. C.

Affidavit having been made before me by Pvt. Tarver J. Thomas, Morals Div., MPDC that he is positive that on the premises known as 215 Gallatin Street, N. W., Washington, D. C., basement and entire premises, occupied by Joseph Robinson in the District of Columbia there is

now being concealed certain property, namely lottery tickets, lottery policies or any book, paper, memorandum or device used in setting up, promoting or maintaining a policy lottery. The facts to sustain this are as set forth in the affidavit attached hereto and made a part hereof, which are in violation of D. C. Code, Title 22, Sections 1501 and 1502 and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search at any time in the day or night and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 1st day of February, 1957

/s/ James F. Splain
U. S. Commissioner.

[Filed: 2:25 p.m.]

RETURN

I received the attached search warrant February 1st, 1957, and have executed it as follows:

On February 1st, 1957, at 6:00 o'clock p.m., I searched the premises described in the warrant and

I left a copy of the warrant with James Gaston together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

$17.00 in change
Quantity of numbers slips
Quantity of rundown tapes
1 Burroughs electric adding machine P1442911
1 Burroughs portable adding machine (electric)
Adding machine rolls
1 Metal box (tool) contg. numbers slips
2 large brown paper bags contg. a large number of numbers slips, rundown tapes & related numbers paraphernalia.

This inventory was made in the presence of James Gaston, Lt. S.E. Moyer and Pvt. T.J. Thomas.

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

/s/ Cpl. Jack E. Lockhart

Subscribed and sworn to and returned before me this day of , 19

STATEMENT OF FACTS RELATIVE TO REQUEST FOR UNITED STATES COMMISSIONER'S SEARCH AND ARREST WARRANTS FOR THE PREMISES AND PERSONS DESCRIBED BELOW FOR VIOLATION OF THE LOTTERY LAWS OF THE DISTRICT OF COLUMBIA:

SEARCH WARRANT:

215 Gallatin Street, northwest, (entire premises), Washington, D. C., a two-story row brick house with basement, occupied by Joseph Robinson and owned by Madeline F. Powdell, according to the records of the Assessor's Office, D.C.

ARREST WARRANT:

Joseph Robinson, colored, male, 50 years, 5'11", 190 lbs., scar over left eyebrow.

I have known Joseph Robinson, a known and convicted numbers operator, for several years and have had him under observation from time to time since about September, 1952.

Beginning on January 10th, 1957, up until about January 29th, 1957, I observed Robinson driving through Lamont Street, northwest, at Georgia Avenue, northwest, practically every day, and on January 29th, 30th, and 31st, 1957, followed him over his numbers route, which is outlined in this affidavit. Joseph Robinson was arrested on May 20th, 1947, for possession of numbers slips and fined $50 and 60 days. On August 19th, 1948, Joseph Robinson was arrested and charged with operating a lottery and possession of numbers slips. As a result of an investigation by Pvts. Burtell M. Jefferson and Virgil J. Hood, Morals Division, which covered observation from September 20, 1952 through October 1st, 1952, a search warrant was obtained for premises 1433 S Street, northwest, the home of Joseph Robinson at that time, and an arrest warrant was obtained for Joseph

Robinson for violations of the lottery laws. On September 22nd, 1952, Pvt. Hood attempted to make a numbers play with Joseph Robinson in the vicinity of the 3300 block of Georgia Ave, northwest, at which time Robinson had numbers slips in his hand but told the officer that he had stopped writing numbers and all that he was doing now was picking up numbers. When the search warrant was executed for premises 1433 S Street, northwest, they found no one in the house but found numbers run-down tapes, numbers cut cards, number slips, coin wrappers, paper clips, adding machine tapes, and rubber bands.

About 1 p. m., Tuesday, January 29th, 1957, I observed Joseph Robinson operating 1950 Pontiac convertible bearing D. C. tags AS 12-63 park in the 800 block of Otis Place, northwest. He got out of the car, coat pockets bulging, and entered premises 819 Otis Place, northwest. He remained a few minutes, came out with coat pockets still bulging, returned to his car and drove off. He was followed to the rear of Garfield Hospital where he parked, got out with pockets bulging and entered a rear door. About five minutes later he came out, coat pockets still bulging. He returned to his car and drove off. He was followed to Eleventh and Columbia Road, northwest, where he parked and entered an apartment house at 1108 Columbia Road, northwest, with his pockets still bulging. About 1:20 p. m., Joseph Robinson came out of 1108 Columbia Road, northwest, pockets still bulging, got in his car and drove off. He was followed to the 1300 blcok of Tenth Street, northwest, where he parked, got out of the car, pockets still bulging and walked to 1328 Tenth Street, northwest, where he entered same. He immediately came out, placing a brown envelope in his inside coat pocket, and drove off. He was followed to the 1300 block of Vermont Avenue, northwest, where a colored male came out of basement of 1340 Vermont Avenue, northwest, took a brown envelope from his pocket and passed it through the passenger side of the car to Joseph Robinson. Joseph Robinson then drove off and was followed to the alley in the rear of the 1200 block of Vermont Avenue, northwest, where he parked his car and walked away with his coat pockets bulging. About five minutes later he returned to his car, pockets bulging and drove off. He was followed to 1400 S Street, northwest, where he parked and entered

1433 S Street, northwest, pockets bulging. About 2:25 p. m., Joseph Robinson came out of 1433 S Street, northwest, went next door to 1435 S Street, northwest, remained a few minutes, returned to 1433 S Street, northwest. During this period from 2:10 p. m. to 2:25 p. m., several unidentified colored males and females entered premises 1433 S Street, northwest, remained a few minutes, and then came out. About 2:30 p. m., Joseph Robinson came out of premises 1433 S Street, northwest, with pockets bulging, returned to his car and drove off. He was followed to the 200 block of Gallatin Street, northwest, where he parked, got out with pockets bulging and was joined by John Doe #1 (colored, male, 43 years old, 5'9", 160 lbs., medium brown skin), who got out of Coastline Cab No. 33 with a huge bulge from his coat pockets. Joseph Robinson and John Doe #1 entered premises 215 Gallatin Street, northwest, through the front door with their clothing bulging. I remained in the area until 3:30 p. m., and did not see anyone leave these premises. About 6:00 p. m., same date, I returned to the vicinity of 215 Gallatin Street, northwest. About 6:50 p. m., Joseph Robinson and John Doe #1 came out of premises 215 Gallatin Street, northwest, and walked to Joseph Robinson's car, both men got in and Joseph Robinson then drove off with John Doe #1 as a passenger.

About 1:00 p. m., Wednesday, January 30th, 1957, I observed Joseph Robinson, operating 1950 Pontiac convertible, D. C. AS 12-63, park in the 800 block of Otis Place, northwest. He got out of the car, coat pockets bulging, and entered premises 819 Otis Place, northwest. He remained a few minutes, came out, coat pockets still bulging, returned to his car and drove off. He was followed to the rear of Garfield Hospital where he parked, got out with pockets bulging, and entered a rear door. About five minutes later he came out, coat pockets still bulging. He returned to his car and drove off. He was followed to Eleventh and Columbia Road, northwest, where he parked and entered an apartment house, 1108 Columbia Road, northwest, with his coat pockets still bulging. About 1:20 p. m., Joseph Robinson came out of 1108 Columbia Road, northwest, pockets still bulging, got in his car and drove off. He was followed to the 1300 block of Tenth Street, northwest, where he parked, got out of the car, pockets still bulging. He immediately went back to his car. An unidentified

colored woman came out of premises 1328 Tenth Street, northwest, and walked to his car. After a conversation between them, the woman went back to premises 1328 Tenth Street, northwest, and Joseph Robinson drove off. He was followed to the 1300 block of Vermont Avenue, northwest, where he double parked. A colored male, about 45 years old came out of the basement of 1340 Vermont Avenue, northwest, and after a conversation, Joseph Robinson drove off. He was followed to the alley in the rear of the 1200 block of Vermont Avenue, northwest, where he parked, got out of his car, pockets bulging, and walked away. About five minutes later, Joseph Robinson returned to his car, coat pockets bulging, and was followed to the 1400 block of S Street, northwest, where he parked, got out of his car, coat pockets bulging, and entered premises 1433 S Street, northwest. About 2:25 p. m., Joseph Robinson came out of premises 1433 S Street, northwest, and entered 1435 S Street, northwest, remained a few minutes, came out and returned to 1433 S Street, northwest. During this period of observation, premises 1433 S Street, northwest, two unidentified colored males whom I had observed enter premises 1433 S Street, northwest, on January 29th, 1957, again entered these premises, remained a few minutes and then left. About 2:35 p. m., Joseph Robinson came out of premises 1433 S Street, northwest, coat pockets bulging, returned to his car and drove off. I went to the vicinity of the 200 block of Gallatin Street, northwest. About 3:00 p. m., John Doe #1 got out of a cab in the 200 block of Gallatin Street, northwest, entered premises 215 Gallatin Street, northwest, with his coat pockets bulging. About 3:20 p. m., Joseph Robinson parked his car, AS 12-63, in the 200 block of Gallatin Street, northwest, got out, coat pockets bulging, and entered premises 215 Gallatin Street, northwest. Officer Thomas observed these premises until 3:40 p. m., and did not see anyone leave. About 6:00 p. m., I returned to the 200 block of Gallatin Street, northwest, and went to the rear of premises 216 Gallatin Street, northwest. I could hear the operation of adding machines from the rear basement window, also the sound of male voices. About 6:30 p. m., Joseph Robinson and John Doe #1 came out of the premises 215 Gallatin Street, northwest, with John Doe #1 carrying a large brown paper bag.

Both got in Joseph Robinson's car and drove off. They were followed to Fourteenth and Corcoran Street, northwest, where John Doe #1 got out of the car and entered the Coastline Cab office, carrying a brown paper bag. He had a conversation with Walker Johnson, a known numbers backer. After about five minutes, John Doe #1 then left the premises.

About 1:00 p. m., Thursday, January 31st, 1957, I observed Joseph Robinson park his car bearing D. C. tags, AS 12-63, in the 800 block of Otis Place, northwest. He got out of his car, coat pockets bulging, entered premises 819 Otis Place, northwest. He returned to his car about five minutes later, pockets still bulging and drove off. He was followed to the rear of Garfield Hospital where he parked, got out of his car, coat pockets bulging, and entered a rear door. About five minutes later he came out, coat pockets still bulging, returned to his car, and drove off. He was followed to the vicinity of Eleventh and Columbia Road, northwest, where he got out of his car, coat pockets still bulging, and entered an apartment house, 1108 Columbia Road, northwest. About fifteen minutes later, Joseph Robinson came out of this apartment, pockets still bulging, and drove off. About 2:15 p. m., Joseph Robinson's car, AS 12-63, was observed parked in the 1400 block of S Street, northwest. About 2:20 p. m., a colored male who I had observed entering premises 1433 S Street, northwest, on January 29th and 30th, 1957, entered these same premises. A few minutes later this same man came out of 1433 S Street, northwest. Following him was an unidentified colored woman, who also came out of 1433 S Street, northwest. About 2:35 p. m., Joseph Robinson came out of premises 1433 S Street, northwest, pockets bulging, carrying a brown paper bag in his left hand, got in his car and drove off. At this time, I went to the vicinity of the 200 block of Gallatin Street, northwest. About 3:00 p. m., Joseph Robinson parked his car in the 200 block of Gallatin Street, northwest, carrying a brown paper bag, pockets bulging, and entered premises 215 Gallatin Street, northwest, through the front door. I remained in the area until about 3:30 p. m. and did not see anyone else enter these premises. About 6:10 p. m., I returned to the 200 block of Gallatin Street, northwest, and went to the rear basement window of 215 Gallatin Street, northwest, where I could hear the operation of adding machines and the jingling of money.

I looked through about a half inch space on each side of the basement window shade and saw a colored man, about 42 years, 5'7", 160 lbs., dark brown skin, enter what appeared to me to be a toilet or closet near the rear door of the basement. I also saw Joseph Robinson standing in the basement in his shirt sleeves, at which time he did not appear to be doing anything. About 6:50 p.m., Joseph Robinson and a colored male and a female came out of the front door, premises 215 Gallatin Street, northwest, and got in Joseph Robinson's car. They were followed to the unit block of Sheridan Street, northeast, where this colored male got out of the car and entered #60 Sheridan Street, northeast. This is a home of a known numbers operator who is known as "Jinky Brooks." At this time Joseph Robinson drove off with this colored female passenger and was followed to the 1800 block of S Street, northwest, where I discontinued my observation.

On all occasions where a brown paper bag, bulging coat pockets, brown envelope, was mentioned in this statement, it is the firm belief of the undersigned officer that it contained number slips or other numbers paraphernalia.

I am positive that number slips and/or other number paraphernalia is now being concealed in premises 215 Gallatin Street, northwest, (entire premises), Washington, D.C., and that all aforementioned named or described individuals are actively engaged in the operation of a policy lottery, commonly referred to as the "numbers game" contrary to and in violation of the lottery laws of the District of Columbia.

/s/ Tarver J. Thomas
MPDC, Morals Division

[JURAT, dated February 1, 1957.]

/s/ James F. Splain
U.S. Commissioner for the District of Columbia

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

3 TARVER THOMAS

was called as a witness for the Government and, being first duly sworn, was examined and testified as follows:

4 DIRECT EXAMINATION

BY MR. FLANNERY:

Q. Officer Thomas, please keep your voice up and state your name. A. Tarver James Thomas, Jr.

Q. You are a member of the Metropolitan Police Force, are you not? A. I am.

Q. And you are attached to the gambling squad, isn't that correct? A. I am.

Q. Were you so employed on January 29, 1957? A. I was.

Q. Now, directing your attention to that date, namely, January 29, 1957, did you do certain work in connection with this case? A. I did.

Q. Directing your attention again to January 29, at 1:00 p.m., where were you at that time? A. I was in the vicinity of Georgia Avenue and Otis Place, Northwest.

Q. Were you alone or with someone else? A. I was alone.

Q. Were you in an automobile or on foot? A. I was in a car.

5 Q. All right. Now, what did you do or see around 2:00 p.m.? A. I observed a man known to me as Joseph Robinson operating a Pontiac coming north on Georgia Avenue. He made a left turn into Otis Place, parked his car, and entered 819 Otis Place, Northwest. A few minutes later he came out and returned to his car and he drove off. And I followed him to the rear of Garfield Hospital. That is 11th and Euclid, Clifton, Northwest. He got out of his car and entered the rear door of Garfield Hospital. A few minutes later he returned to his car, got in his car, and drove off. I followed him from there to 11th and Columbia Road, Northwest where he parked and entered 1108 Columbia Road, Northwest. About fifteen minutes later he returned to his car and drove off. And I followed him from there to the 1500 block of 10th Street, Northwest, where he parked and entered 1528 - 10th Street, Northwest.

Q. Was it 1528 - 10th? A. 1528 - 10th Street, Northwest.

Q. Then what did you observe? A. A few minutes later he came out placing a brown envelope in his inside coat pocket, got in his car, and he drove off. I followed him from there to the 1300 block of Vermont Avenue, Northwest, where he doubleparked, and a man came out of the basement of 1340 Vermont Avenue, Northwest and passed a

6 brown envelope through the passenger side of the car to Joseph Robinson. From there Joseph Robinson drove off to the alley rear of the 1200 block of Vermont Avenue, Northwest. He left his car and walked away, and about five minutes later returned to his car and drove to the 1400 block of S Street, Northwest. He parked, got out of the car, and entered 1433 S Street, Northwest. A few minutes later he came out of 1433 S Street, Northwest, which is the home of Joseph Robinson, and entered 1435 S Street, Northwest. A few minutes later he came out of 1435 S Street, Northwest, returned to 1433 S Street, Northwest. During my observations of 1433 S Street, Northwest, a man who I know --

Q. Well, you better not say that. Did you see someone? A. Other people entering 1433 S Street, Northwest.

Q. All right. A. Remain a few minutes and then leave. Around two-thirty, Joseph Robinson came out, two-thirty-five Joseph Robinson came out of 1433 S Street, Northwest, got in his car, and drove off. I followed him to the 200 block of Gallatin Street, Northwest where he parked his car and got out. He was walking east in the 200 block of Gallatin Street, Northwest, when a Coastline Cab pulled up and James Gaston got out of his car. The two men entered 215 Gallatin

7 Street, Northwest. I stayed in this vicinity until about three-forty that evening. I did not see Joseph Robinson or Gaston come out of 215 Gallatin Street, Northwest.

Q. All right. Now, Officer Thomas, for the record, let me ask you, do you see Joseph Robinson in the courtroom today? A. I do.

Q. Would you please point him out? A. This gentleman (indicating), seated in the back of Attorney Williams in the dark coat.

Q. Do you see Gaston in the courtroom today? A. The gentleman seated to the left of Mr. McKenzie with the glasses in his hands.

MR. FLANNERY: May the record indicate that the witness has pointed out the two defendants.

THE COURT: It may so indicate.

BY MR. FLANNERY:

Q. Did you make notes in connection with this case? A. I did.

Q. You made reference to the fact that you went to a place on 10th Street, Northwest. Now, what address did you say you went to on 10th Street? A. 1528 - 10th Street, Northwest. It is between P and

8 Rhode Island Avenue on the west side of the street. There is a real estate company on the corner, and this is the second door going south on 10th Street.

Q. Do you have your notes with you? A. The notes--if I am not mistaken, the affidavit on 1528 was supposed to have been corrected the day that the warrants were, the affidavit was sworn to, but it was an oversight.

Q. I notice the affidavit says 1328. Was it actually 1528? A. That is right, 1528.

Q. Now, then, I direct your attention to January 30, 1957. Did you make certain observations on that date in connection with this case? A. I did.

Q. Now, I direct your attention, therefore, to January 30, 1957, around 1:00 p. m. in the afternoon. Where were you at that time? A. In the vicinity of Georgia Avenue and Otis Place, Northwest.

Q. In the District of Columbia? A. That is correct.

Q. And all these addresses you have referred to have been in the District of Columbia, isn't that right? A. That is correct.

9 Q. Now, what did you do at 1:00 p. m. on January 30, 1957? A. About 1:00 p. m. I observed Joseph Robinson driving the same car north on Georgia Avenue, left into Otis, and park and enter 819 Otis Place, Northwest. He got out a few minutes later, returned to his car, and drove off; and I followed him from there to the rear of Garfield Hospital, where he parked and entered the rear door. A few minutes later he returned to his car and he went, drove to 11th and Columbia

Road, where he parked and entered 1108 Columbia Road, Northwest. About fifteen minutes later he came out, drove south on 11th Street to the 1500 block of 10th Street. He parked, got out of his car, and immediately returned to his car. And a woman came out of 1528, came to the passenger side of Robinson's car and had a conversation with him. A few minutes later he drove off, and I followed him from there to the 1300 block of Vermont Avenue, Northwest. A man came from the basement of 1340 Vermont Avenue, came to the passenger side of the car, had a conversation with Robinson; and after that, Robinson drove off. I followed him from there to the alley rear of the 1200 block of Vermont Avenue, where he parked and got out of his car and walked away. A few minutes later he returned to his car, and I followed him from there to the 1400 block of S Street, Northwest, where he parked his car and entered 1433 S Street, Northwest. A few minutes later he came out of
10 1433 and went right next door to 1435, and he later returned, in about five minutes, to 1433 S Street, Northwest. About two-thirty-five p. m., Robinson came out of 1433 S Street, Northwest, got in his car, and drove off. I went to the 200 block of Gallatin Street, Northwest. About three p. m. Gaston got out of the cab and entered 215 Gallatin Street, Northwest. About three-twenty p. m. Robinson entered the 200 block of Gallatin Street, parked his car, and entered 215 Gallatin Street, Northwest. About six p. m. that evening I went to the rear of 215 Gallatin Street, Northwest; and I could hear a radio, adding machine, and two men talking. I could hear male voices. About six-thirty p. m. Joseph Robinson and Gaston came out of the front of 215 Gallatin Street, Northwest. They got into Robinson's car and drove off.

Q. Did you observe anything about them when they came out around six-thirty p. m.? A. Gaston was carrying a large brown paper bag, and I followed them from the 200 block of Gallatin Street to 14th and Cochran Street, Northwest, where Gaston got out of the car, carrying this brown paper bag, and entered this Coastline gas station at 14th and Cochran, had a conversation with Walker Johnson.

Q. All right, did that conclude your observations for that day?

11 A. That is correct.

Q. Now, then, I will direct your attention to the following day, January 31, 1957. Did you make certain observations on that date? A. I did.

Q. Please tell His Honor and the jury what they were. A. About one p. m. on the 31st I was in the vicinity of Georgia and Otis, and I observed Robinson driving his car north on Georgia Avenue, left into Otis, and park. He entered 819 Otis Place, Northwest. A few minutes later he came out, returned to his car, and he drove off. And I followed Robinson to the rear of Garfield Hospital where he parked and went in the rear door. About five or ten minutes later he returned to his car and drove off. And I followed him from there to 11th and Columbia Road. He parked in the vicinity of 11th and Columbia Road and entered 1108 Columbia Road, Northwest. About fifteen minutes later he returned to his car and drove off. I lost him that day. About two-fifteen I went to the 1400 block of S Street, Northwest, and I observed his car, a 1950 Pontiac convertible, AS-1263, parked in this block. I made observation of 1433 S Street and observed the same people entering 1433 S Street on the 31st as I did observe on the 30th and the 29th of January. At about
12 two-thirty-five p. m. Robinson came out of 1433 S Street, Northwest, carrying a large brown paper bag, got in his car, and he drove off. I went to the 200 block of Gallatin Street; around three p. m., Robinson parked in the vicinity of the 200 block of Gallatin Street, Northwest, and entered the front door, carrying this brown paper bag. I stayed there until about three-forty p. m. I didn't see anyone else enter. About six o'clock that evening I went back to the 200 block of Gallatin Street, Northwest, and went to the rear of 215. And then the shade in the rear window of 215 Gallatin Street, Northwest, on the left and the right there was about an inch of space on each side of the shade. I could hear the sound of an adding machine and the jingling of money. Later on, a few minutes later, I observed Gaston--there was a closet, a rear door here and a closet, looked like to be to the left on the side wall; and I also observed Joseph Robinson standing in this basement in his shirt sleeve. A few minutes later I left the rear of these premises.

A little later I observed Joseph Robinson, a female, and another colored male come out of 215 Gallatin Street, Northwest, get into the car, and drive off.

Q. All right. Now, then, on February 1, 1957, did you go to the United States Commissioner? A. I did.

13 Q. And did you secure something there? A. I secured a search warrant for premises 215 Gallatin Street and arrest warrant for Joseph Robinson.

Q. Then later in the day on February 1, 1957, did you do something? A. I came with other officers, we went to 215 Gallatin Street, Northwest, to serve a search warrant.

Q. About what time? A. Around 5:45 p. m.

Q. Very well. Now, tell His Honor and the jury what you did on February 1, 1957, when you went with other officers to execute the search warrant and the arrest warrant. A. We went to the rear of 215 Gallatin Street, Northwest. We knocked on the door. We announced our purpose, that we were police and had a search warrant for the premises. No one answered the door. And we knocked again and still got no answer. The door was forced, and we entered. Robinson was standing on the floor, and Gaston was seated at a table containing adding machines and number slips.

Q. Now, who entered the rear door with you? A. Corporal Lockhart, Sergeant Foran, Captain Thoman, and myself.

14 Q. All right. Now, then, did you do anything when you gained access to the premises? A. That was the gist of my activity.

Q. Now, did you seize certain evidence and mark it? Did you seize any money? A. I could have recovered some property. If I did, I marked it.

MR. FLANNERY: Will Your Honor bear with me one moment?

THE COURT: Yes. I think we will adjourn until 1:45.

(Thereupon, the Court recessed at 12:22 o'clock p. m., and reconvened at 1:48 o'clock, p. m.)

Thereupon

TARVER THOMAS

resumed the witness stand and testified further as follows:

DIRECT EXAMINATION (CONTINUED)

BY MR. FLANNERY:

Q. Officer Thomas, just before lunchtime you told us how you entered 215 Gallatin Street, Northwest, and what you saw when you entered that place. Now, then, after getting entry, did either one of these two defendants, Gaston or Robinson, say anything about your being there? A. Gaston admitted ownership of the property seized.

MR. McKENZIE: Just a minute, I want to object.

15 THE COURT: State the conversation rather than the conclusion, any conclusion. You may answer the question.

THE WITNESS: Gaston was asked, they were both asked about the ownership of the property seized there, and Gaston admitted ownership of the property.

THE COURT: No. You are stating a conclusion. State as near as you can remember his language what he said.

THE WITNESS: He stated it was his.

BY MR. FLANNERY:

Q. The property was his? A. Yes.

Q. By property, what do you mean? A. Number slips, adding machines.

MR. FLANNERY: All right. Now, make this No. 1 and the contents 1-A.

(Thereupon, the exhibits were marked Government Exhibits No. 1 and 1-A for identification.)

BY MR. FLANNERY:

Q. Officer Thomas, I will show you what has been marked for identification as Government Exhibit No. 1 for identification, this brown envelope, and I will ask you to look at that and tell me if you can identify the envelope. A. If I can identify the envelope?

16 Q. The brown envelope, yes. A. I can identify the envelope, but my signature is not on this envelope.

Q. How can you identify the envelope? A. I can't as for the writing or information contained on the envelope. I couldn't say that anything about this envelope--

Q. Let me ask you this. Did you seize anything from the person of Joseph Robinson? A. I did.

Q. What did you seize from Joseph Robinson? A. Some money.

Q. Do you recall how much money? A. Right off I don't recall the amount of money I got from Robinson.

MR. FLANNERY: Your witness.

CROSS EXAMINATION

BY MR. WILLIAMS:

Q. Mr. Thomas, did you ever see Mr. Robinson, Joseph Robinson who sits at the table there take a bet from anyone? A. I did not.

Q. Did you ever place a bet with him sir? A. Never.

Q. Did you ever see him place a bet, sir? A. Never.

17 MR. WILLIAMS: That is all, Your Honor.

BY MR. McKENZIE:

Q. Will you indulge me a moment, sir. Officer Thomas, calling your attention to the day of January 29, 1957, when you made your report concerning your activities that day, did you say that you saw a man whom you called John Doe in connection with your investigation? A. That is correct.

Q. Had you? A. That is correct.

Q. And at the time did you describe John Doe as being a person weighing about 160 pounds? A. That is correct.

Q. And five feet nine in height? A. That is correct.

Q. And you gauge his age as 43, is that correct? A. That is correct.

Q. And as far as that person is concerned, the only thing you saw that person do was to get into a taxicab, is that correct? A. That is not correct.

Q. Now, the fact is that John Doe got out of a taxicab? A. That is correct.

18 Q. And then he got into an automobile with the other defendant, is that so? A. At a time he got into a car with another man.

Q. And what time of the day was it, if you recall, that John Doe got out of the cab and entered this automobile? A. I didn't state that.

Q. I am asking you if you recall now. A. I didn't state anything like that.

Q. Well, if I misconstrued, let me ask you this. On this particular day, the 29th, you did see a man you identified as John Doe? A. That is correct.

Q. And what time of the day was that? A. About three p. m.

Q. And when you first observed him, where was he and what was he doing? A. I observed him get out of this cab and enter 215 Gallatin Street, Northwest.

Q. Now, did he enter there alone? A. He entered with Joseph Robinson.

Q. What time did they enter? A. About three p. m.

Q. And did you see them come out again? A. I did.

Q. What time? A. About six-fifty in the evening.

19 Q. And is that the only observation you had as to John Doe on that day; is that the only thing you saw him do? A. That is correct.

Q. Now, on the 30th, did you again see John Doe get out of the taxicab? A. I did.

Q. And did he then enter 215 Gallatin Street again? A. He did.

Q. Is that the only thing you saw him do up to the time he entered the premises? A. That is correct.

Q. When he went into the premises, were you able to see in what part of the house he went? A. Front door.

Q. But after he got in you don't know what part of the house he went to, is that correct? A. That is correct.

Q. And then sometime later, about six-thirty, did John Doe leave these premises 215 Gallatin Street? A. That is correct.

Q. And you say he had a large paper bag with him at that time? A. That is correct.

20 Q. You didn't see what was in the bag? A. I did not.

Q. Now, at that time, did he go into the office of a taxicab company there? A. That is correct.

Q. And did you observe to see how long he stayed there? A. About five minutes.

Q. And when he came out, where was the bag then? A. The bag was still in his possession.

Q. Did he leave it in the taxicab company or did he carry it away with him? A. It was in his possession.

Q. Do you recall that when you made the report of this incident you did not state that he carried the bag away with him when he left the Coastline Taxicab Company office? Do you remember that? A. I made a mistake there, Mr. McKenzie. The bag was left in the cab office.

Q. It was left in the taxicab office? A. Yes, sir.

Q. Officer Thomas, during this period, the 29th and 30th and 31st, you didn't see any bets taken by this defendant, Gaston, did you? A. I did not.

21 MR. McKENZIE: Your Honor, may I see that jacket just a moment in this case.

(The Deputy Clerk handed the jacket to Mr. McKenzie.)

BY MR. McKENZIE:

Q. Officer Thomas, in connection with this matter, did you appear before the office of the United States Commissioner in this building and make application for a search warrant? A. I did.

Q. And did you also make application for an arrest warrant? A. I did.

Q. Did you make an application for an arrest warrant naming James Gaston? A. I did not.

Q. Did you make application for a search warrant naming James Gaston? A. I did not.

MR. MCKENZIE: I have no further questions.

MR. FLANNERY: That is all for this witness.

THE COURT: You may step down.

MR. FLANNERY: I did want to ask one more question.

22 REDIRECT EXAMINATION

BY MR. FLANNERY:

Q. The John Doe that Mr. McKenzie referred to in his questions, now, who was that? A. Gaston.

* * *

123 MR. McKENZIE: This is a copy of the search warrant issued. I had some inquiry concerning this person there. I wanted to get this document itself in evidence. I want the jury to see it. I don't want all this business attached to it.

124 THE COURT: What is the purpose of this?

MR. McKENZIE: The purpose is to show as far as I am concerned that the search warrant was never issued as against my defendant, that he was not concerned with it.

THE COURT: I don't think that is material. I would have to rule that out, Mr. McKenzie. Anyway, it is a John Doe search warrant. It is sufficient to describe it. The jury can't be concerned with it. The jury is only concerned with the evidence here in this case and not with the question of the search, anything about the search or anything in connection with the arrest.

MR. McKENZIE: I am not challenging on this paper the legality of the search. I am trying to get this paper in evidence for the purpose of showing the investigating officer asked for this warrant and that my defendant is no place named in it.

THE COURT: I really don't think that is material. You can make your offer so that you will have it in the record. The record may indicate that both defendants are offering it?

MR. WILLIAMS: No. As to this paper, no. The other things I join in.

125 THE COURT: As to this offer?

MR. WILLIAMS: No.

THE COURT: As to the defendant Gaston, the search warrant has been offered in evidence, and I assume there is objection to it.

MR. FLANNERY: There is objection.

THE COURT: I sustain the objection. Anything further?

MR. WILLIAMS: Do you want to make the motion now?

THE COURT: Do I want to? I don't want to. Go ahead and make your motion.

MR. WILLIAMS: I move for a motion for judgment of acquittal; and as grounds for the motion, I would like to adopt the argument made yesterday morning with regard to the jury and failure to examine the grand jury panel and, in addition, the denial of my motion to grant a severance and to dismiss the indictment on the grounds previously stated.

THE COURT: The record may show a motion for judgment of acquittal made by each of the defendants and denied.

MR. McKENZIE: I want the record to show that I want an opportunity to argue my motion, not what I have done already, but what has been elicited here by way of proof. I want an opportunity to do it,
126 and out of the presence of the jury, with ample time, with all due respect to you. I don't want to do that--

THE COURT: That is all right. I will give you what time you want.

MR. WILLIAMS: I think I can finish up here. I would like also for Your Honor to render a judgment of acquittal as to all these counts. I would like to refer Your Honor's attention to the fact that no where during this case is there any testimony with regard to any places Robinson went was a known number place or drop. With regard to Robinson as to 215 Gallatin Street is the fact that he was standing up on the floor. I don't think that is enough to tie him in with this other business.

THE COURT: All I can say, Wesley, if this isn't sufficient-- I will have to say this very quietly--to sustain a conviction in a numbers case, I think the police officers are going to have a pretty difficult time getting a conviction in any numbers case.

MR. WILLIAMS: As far as Your Honor is concerned, we see your position.

THE COURT: It is not that I have a position. In suggesting that, I am talking about the substantive evidence. If this isn't enough to

submit to the jury this question, to sustain a conviction, I can't conceive
127 how the officers could get any kind of a case. Obviously, they are not going to be able to catch these boys red-handed. They don't do things that way; and I think in this case, it happens that as far as I can see, they exercised care in the securing of a search warrant and arrest warrant and they made pretty extensive preparations before they searched that house on numerous occasions and found the pattern was the same on every occasion. So that I can't see that at all.

MR. WILLIAMS: I see your point, Your Honor, but I have a little different viewpoint, not from my viewing it but from the jury's view of it. So I suppose I should preserve that to argue. Has Your Honor read the Calomaris case, United States versus Calomaris? Do you recall, Your Honor, I spoke to you about the necessity of a stamp? I know what Your Honor stated as far as punishment is concerned.

THE COURT: I know that case, but I don't think this is a comparable case.

MR. WILLIAMS: All they show is Robinson going to these places and being present in the place.

THE COURT: No, they have shown more than that. They have shown a key to the front of the house. They have shown enough, in my opinion, to justify an inference by this jury that he aided and abetted the other defendant in this enterprise; and if he did that, then he is required
128 to have a stamp, if he was operating a lottery. Certainly more than one man could operate a lottery. It is my opinion the evidence clearly shows both these men were operating a lottery. If they were, both of them needed a stamp.

MR. WILLIAMS: In this case it was a runner, and they reversed the case.

THE COURT: This fellow wasn't a runner. Runners aren't given keys to the front door.

MR. WILLIAMS: I see your point about that.

THE COURT: Well, anyway, I see what your point is, too, and it is noted in the record. So you have protected your record in this case.

(In open Court:)

THE COURT: We will excuse the jury.

(Thereupon, at 2:55 p. m. the jury retired to the jury room, and the following proceedings occurred out of the presence of the jury:)

MR. McKENZIE: If it please the Court, of course, I renew the motion that I had made unsuccessfully in which we were overruled.

THE COURT: Yes, sir.

MR. McKENZIE: In addition, at this time, and I feel I can be quite brief, I ask for a judgment of acquittal as to the defendant Gaston now for the reason that as to Count 1 there is a total failure of proof
129 that the defendant Gaston has violated Title 22, Section 1501 of the Code. Now, the provision starts by saying: "If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right or interest"--

THE COURT: Sell isn't a part of it. They haven't been charged with selling. Read the prima-facie rule that follows.

MR. McKENZIE: It charges here that they were concerned as owners, agents, and clerks, and in other ways in managing, carrying on, and promoting a lottery. That is charged in part of the indictment.

THE COURT: And what does it say about prima facie? I would like that so I won't forget it.

MR. McKENZIE: I am not reading from the indictment.

THE COURT: That follows right there.

MR. McKENZIE: It is the last sentence. "The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima-facie evidence that the possessor of such copy or record did, at the time
130 and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery."

Now, at least, our minds meet immediately. They were probably apart when I tried to urge you to my point of view, but we start off together, anyway. My contention is from the evidence that has been adduced, here, sir, that nothing here, nothing has come before you which fits the requirement that these defendants had in their possession any record of any such chance, right, or interest, or of any such tickets, certificate, bill, token, or other device, for this reason. In the preceding section the Congress stated: that these tickets, certificates, bills, tokens, or other devices shall purport or intend to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in the lottery. Now, there isn't anything in all this bunch of stuff here, not one single piece of paper, which purports to guarantee or afford a right in anyone to win something on a lottery.

THE COURT: The only trouble with that statement, Mr. McKenzie, is that the Court of Appeals has held differently in Forte v.
131 United States and in Smith v. United States. In the Forte case the court said: "The principal differences between the policy game and the numbers game are that in the policy game the player must choose numbers between 1 and 78, instead of any number of three digits, as in the numbers game, and that the winning number in the policy game is determined by drawing from a wheel, while in the numbers game it is determined by a computation upon prices paid at race tracks. The fundamental point is that in each case there is the offering of a prize, the giving of a consideration for an opportunity to win a prize, and the awarding of the prize by chance." And, of course, our Court of Appeals has said that the numbers game is a lottery, and you have had an expert witness here testify that these documents indicate that whoever had possession of them were in the numbers game.

MR. McKENZIE: As I interpret the testimony, the most this proffered expert stated, and to me he wasn't admitted to be an expert, and the longer he testified the more inexpert he became. He assumed this and I suppose this. And to me that isn't the language of an expert. People who profess to be experts are generally pretty positive. I think

his testimony should be disregarded completely. But notwithstanding the fact, this section of law, taken in its entirety, requires that there
132 be in existence something that indicates there is a chance to win on an existing lottery.

Now, I know what the Court of Appeals has held several times, but I want to read one other provision to you in support of the point I am trying to make.

Now, in 22-1502, which is a misdemeanor violation, possession of lottery or policy slips, this matter was before the Congress of the United States as late as June 29, 1953, when it was amended to read in its present form. And as to the misdemeanor statute, 1502, it states: "If any person shall within the District of Columbia knowingly have in his possession, or under his control, any record, notation, receipt, tickets, certificate, bill, slip, token, paper, or writing, current or not current, used or to be used, he shall be found guilty." And there is a statutory presumption arising from possession alone.

Now, Your Honor, when that matter was before the Congress, the whole business was before Congress, not just this one section; 1501 was there just as much as 1502. But the Congress amended one portion of the law to say as to this portion, "used or to be used, current or not current," that finding shall support guilt. There will be a presumption arising from it.

It is entirely possible that I have not brought the authority with
133 me, but there is a Supreme Court case, and I can supply you with the name and number later, but it proposes this in substance: that where a statute comes before Congress and the statute is comprised of numerous sections and the Congress amends one section, the rule of statutory construction is that the intent of the Congress should be that the amended language should apply only to the amended section.

THE COURT: Is the point you are trying to make, Mr. McKenzie, that not current applies only to the possession section and doesn't apply to the lottery section?

MR. McKENZIE: That is right.

THE COURT: But isn't there enough here in the evidence to show that all these slips were current for one day's current operation, almost a thousand of them?

MR. McKENZIE: As far as the position--and I do not view this objectively; I view it subjectively for my side--I see no proof, no competent, satisfactory, legal proof that any single slip in that entire bunch has been proved to be, and it must be proved beyond a reasonable doubt, a record of a chance on a lottery which was issued that day or for that day on some other days. There isn't any piece of paper that has been shown to you or the jury that says in substance, not in just the exact verbiage, that this is a chance on a lottery, a receipt or a ticket to be
134 drawn on any time after the papers were picked up. In fact, the testimony is that by the time the raid was made, assuming that these tickets might have been for that day, the events upon which the lottery depended had terminated, that it was no longer in existence; and you know from practical experience, as well as I do, that these slips are bookkeeping records, kept by employees of a banker to enable him to determine how much he won or how much he lost and from whom he received money and how much he owed. They don't mean anything as far as a chance on a lottery is concerned.

The things they try to send us from Mexico, the Mexican Lottery, the things from Cuba, the things from Ireland, are actually embossed and engraved. They almost look like certificates of A.T.T. stock. Take the certificate that you have for Dublin and for Cuba and for Mexico City; and if the thing you have is not a forgery or counterfeit, if that thing comes out right, the ticket you got entitles you to a drawing to win; and you just take that ticket and give it to the fellow that pays off. Nobody could take these tickets and get paid off. Those tickets are useless to anyone as far as prizes are concerned.

I believe the language of the Supreme Court of the United States in Halso and in Francis, which are the two preceding, that there has to be a paper which says that this is a chance, guarantees a right to win on
135 an existing and not a completed lottery.

Now, our Court of Appeals, for some reason unknown to me, and in spite of my efforts to praise and uphold them, I found or now find myself with not to inconsiderable a minority who sometimes differ from their judgments, see fit to say the language contained in Section 1502, current or not current, used or to be used, is a matter of law in Section 1501 when as a matter of fact it doesn't. I have a hunch that if this matter can be properly presented--

THE COURT: Before another panel?

MR. McKENZIE: --before the Supreme Court of the United States that they would say, "We think we ought to do something about it. We should clear up the possibility that there is confusion in the minds of people like McKenzie about whether or not our opinions in this matter precluded the Court of Appeals of the District of Columbia from ruling the way they did."

THE COURT: Do you wish to say anything?

MR. FLANNERY: No.

THE COURT: Do you wish to say anything?

MR. WILLIAMS: No.

THE COURT: The Court will deny your motion, Mr. McKenzie.

MR. McKENZIE: In spite of a very unsatisfactory series of
136 rulings on my motions, I want to thank you very much for the courtesy and the opportunity to let me have the opportunity to make my case.

THE COURT: I am not criticizing any lawyer for trying to raise any question he feels legitimately should be raised to protect his client. That is what your responsibility is. Now, what about the time for the defendant Robinson here. How long will it take?

MR. WILLIAMS: Speaking in behalf of Robinson, I can only say this: that I shall renew the same motions and arguments previously made in his behalf and urge Your Honor to consider the case as far as Robinson is concerned as concluded.

THE COURT: I was asking you how long it would take to conclude your defense.

MR. WILLIAMS: My last phrase concludes Robinson's case.

THE COURT: Are you making more motions now?

MR. WILLIAMS: We are concluding our case and renewing our motions.

THE COURT: You made all the motions. I don't think you have to renew them all the time. You renewed them sufficiently. Are you resting then?

137 MR. WILLIAMS: Yes.

THE COURT: Are you resting?

MR. McKENZIE: The defendant Gaston will rest.

THE COURT: Both defendants rest?

MR. McKENZIE: Yes, sir.

* * *

United States Court of Appeals
For the
District of Columbia Circuit

FILED JUL 3 1958

Joseph W. Stewart
CLERK

PETITION FOR REHEARING

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,400

JAMES GASTON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 14,401

JOSEPH ROBINSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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INDEX

	Page
PETITION FOR REHEARING	1- 6
ARGUMENT	6-15
With Respect To Delay	6
As To Qualifications Of Jurors	10
CONCLUSION	15

EXHIBITS

1. Motion For Continuance	16-21
2. Motion For Change Of Venue	22
3. Motion To Require The Court To Inquire Into The Qualifications Of The Present Petit Jurors And Into The Qualifactions Of The Grand Jurors Who Returned The Instant Indictment	22-24
Exhibit "A"	25
Exhibit "B"	26
Exhibit "C"	27
Exhibit "D"	28

UNITED STATES COURT OF APPEALS

For The District Of Columbia Circuit

No. 14,400

JAMES GASTON,

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v.

UNITED STATES OF AMERICA,

Appellee.

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APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PETITION FOR REHEARING

Come now the appellants through counsel and in support of their instant Petition for Rehearing allege as follows:

1. In the trial of the instant cause, below, counsel for appellant James Gaston was T. Emmett McKenzie.

Counsel for appellant Joseph Robinson was Wesley S. Williams.

2. Notice of Appeal, below, was filed on behalf of each defendant by Wesley S. Williams, T. Emmett McKenzie being named in the notice of appeal as counsel for appellant James Gaston.

3. Thereafter T. Emmett McKenzie was relieved of his engagement as counsel for either party and the appeal proceeded as is shown in the record.

4. On June 18, 1958, this Court held the judgment of the court below was affirmed.

5. On June 30, 1958, appellant James Gaston engaged present counsel for the purpose of filing and prosecuting this Motion for Rehearing as follows:

6. Below, and prior to trial, present counsel on behalf of appellant James Gaston filed, amongst others, the following motions, which were duly served upon counsel for the government:

(a) Motion for Continuance predicated upon the generic proposition that commencing on November 4, 1957, and continuing to the day prior to actual trial of the cause, the following persons had, through the media of the local press, radio and television, assailed the judicial activities of the United States District Court for the District of Columbia, and of the United States Circuit Court of Appeals for the District of Columbia Circuit, in such fashion and manner as to cause the citizenry of this district to lack faith in the integrity of the processes of said courts; and in such fashion and manner as to tend to obstruct justice; and in such fashion and manner as to constitute an actual or constructive contempt of each and both of said courts; and in such manner and fashion as to persuade the belief in said citizenry - out of which body of persons jurors are selected - that justice would be done, when, and only when, juries heeding the plea of the prosecution, only; would bring in verdicts of "guilty as charged" irregardless of evidence, instructions,or oaths taken to afford a defendant a fair trial under due process of law.

Supporting this premise the defendant Gaston submitted clippings from a Washington Evening Star, Washington Post and Times Herald and Washington News, reporting that on November 4, 1957, J. Edgar Hoover had made a statement tending to produce such a result; That on November 14, 1957, Police Chief Robert V. Murray was reported in the entire Metropolitan Press as having made remarks tending to establish the condition alleged to exist by the defendant Gaston; On November 21, 1957, the Metropolitan Press reported that Deputy Police Chief Clarence H. Lutz made such remarks and that appearing with him was United States District Attorney Oliver Gasch who joined with Lutz in his hostile criticism of the Courts in this District; that on November 23, 1957, representative Davis, Dem. Georgia, stated through the press that he was so impressed by the remarks of Chief Murray that he was contemplating a congressional inquiry to inquire into the alarming trend on the part of our local Courts to favor the criminal at the expense of Society; that on December 19, 1957, deputy Police Chief Edgar E. Scott declared, as reported in the Washington Star, that the Mallory decision and other restrictive opinions of Appellate Courts amounted to following the communistic line designed to weaken the prestige of law enforcement agents; on the same date this official is reported as having said our Courts have come perilously close to the point where the rights of the public are given no consideration; On December 13, 1957, Deputy Chief Lutz stated through the press he had made the remarks referred to supra, to stir the citizens and to arouse them.

These references do not constitute the entire content of the remarks of such nature made by the persons named, and at the day for hearing on the motion to continue or to grant change of venue by reason of such remarks, the defendant Gaston had present in Court Deputy Chiefs Scott and Lutz, representatives from each of the Metropolitan Papers, representatives from each of the Metropolitan Radio and T. V. Stations who had responded to subpoenas duces tecum and had brought their records and file concerning such publicity.

Nevertheless the Trial Court refused to permit the defendant to call these persons as witnesses in support of his said motions.

The Court did not, sua sponte, make any inquiry nor did he permit one to be made by the defendant.

A recent case of considerable notoriety involving the same principle of law was that of United States v. Hoffa, 156 Fed. Supp. 495, 500, the prosecution going forward in New York wherein it was established that in matters of this sort the best practice is not to grant an indefinite postponement nor one for a substantial period of time until the Court has determined, and this upon the voir dire, what effect the publicity has had upon the jurors, and the key to the rational is the conduct of a searching inquiry into the matter whether by counsel or by the Court.

This demand for relief was filed in writing and served upon the United States District Attorney as required by the rules of Court. The District Attorney did not file any answer or opposition and when the defendant Gaston requested the Court to enforce his right to have a reply before the matter came on for hearing the District Attorney stated (R. 167, 168) that he would answer orally and that as a matter of policy his office filed answers on approximately 50% of motions filed by defendants. The Court declined to require the prosecution to serve an answer.

At (R. 166, 167) counsel for defendant Gaston advised the Court he was of the opinion his client was entitled to have his motions heard and considered prior to trial and the Court replied that ordinarily that procedure would be followed that in the instant case he could think of no reason why he could not decide all of the questions presented by defendant's motions instanter.

Finally the Court denied the motion for continuance and the motion for change of venue.

Thereupon the Court took up the matter of the motion to inquire into the qualifications of the grand jury which returned the indictment and into the qualifications of the trial panel.

The Court was of the opinion that nothing could be done with respect to the qualifications of the grand jurors but that with respect to the quali-

fications of the trial jurors said :

> (R. 177). THE COURT: Well, I think you have a point, Mr. McKenzie, with repsect to the matter of securing a fair and impartial petit jury here, to such an extent that the Court will permit greater liberalities than ordinarily is done in the selection of a petit jury to permit you to inquire into the prospective panel to determine whether, because of any possibility of gambling among them, that would interfere with their being fair jurors in this case; and the Court will advise those jurors as to their rights in answering those questions. But I think with that condition, the Court will proceed in the selection of the jury.

The defendant Gaston relying upon title 11, Section 1417, District of Columbia Code providing that to be qualified as a juror one must be "a good and lawful person" and relying upon information strongly tending to establish that about 50% of the population in the District of Columbia are active gamblers and in constant violation of the gaming laws, the defendant desired the Court, sua sponte, to inquire of the panel as to what percentage thereof were persons whose betting activities amounted to a constant violation of the gaming laws believing that such an examination by the Court would avoid the tendency to develope a hostile reaction should that inquiry be directed by defense counsel. The Court declined so to do.

At this time in connection with this case there was present not only the panel of Judge Youngdahl, Trial Judge, but the panel of Judges Holtzoff and Pine.

At (R. 187) members of the panel who gambled having been asked to rise it was apparent that the entire panel was comprised of active gamblers and on this juncture the Trial Court revoked the permission he had given counsel to inquire into the matter of gambling by jurors and announced that he would take over that phase of the situation personally.

At (R. 190) counsel for the defendant asserted that he was dissatisfied with the Court's examination and renewed his request to be permitted to conduct a voir dire in the matter.

This was denied.

Eventually a jury was obtained after the defense had exhausted each and every one of its peremptory challenges and (R. 204) requested additional peremptory challenges.

This request was denied.

The eventual jury was comprised of a foreman - a non gambler; 11 gamblers, and 2 gamblers as alternates.

The appellants introduced no testimony nor evidence and did not take the stand.

They renewed the original motions and made a further motion for judgment of acquittal on the basis of lack of qualified jurors; and being compelled to go to trial on said date notwithstanding the ground urged upon the Court for continuance or change of venue.

The verdict of the Jury was guilty as to each defendant on every count of the indictment.

ARGUMENT

Counsel is not unmindful that this effort on behalf of the appellants departs the usual course of procedure, and he experiences a feeling of apprehension because of two factors:

1. The proximate arrival of the date for issuing the Court's mandate; and

2. The failure to urge the points now stressed in the original appellate proceeding.

With Respect To Delay

Delay where the acting party has failed in the matter of being prompt through inadvertence, surprise or excusable neglect is generally regarded by Courts as being non-fatal to a litigant's rights. In the instant cause the record of this Court will show (R. 154) the following

designation of record by appellants and a counter designation by the appellee (R. 155).

Judgment was on February 21, 1958, and on the same day Wesley S. Williams, Esq., acting on behalf of the appellants filed notice of appeal for each. The Notice of Appeal filed on behalf of appellant Gaston identified that appellant's attorney as T. Emmett McKenzie. This counsel was shortly thereafter dismissed.

On March 13, the appellants designated a record on appeal covering:

1. All docket entries.
2. The indictment.
3. The Judgment and commitment.
4. The notice of appeal.
5. This designation of record.

On March 25, the United States District Attorney filed a counter-designation as follows:

1. The transcript of the proceedings.
2. This counter-designation.

On May 28, 1958 the following document was filed in the cause: (R. 208)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	(Filed May 28, 1958, /s/ Harry M. Hull)
v.	:	
JAMES GASTON and JOSEPH ROBINSON,	:	(Criminal No. 307-57
Defendants.	:	

ORDER

Upon consideration of the oral motion of the United States by its attorney, the United States Attorney, and pursuant to Rule 75(h), Fed. R. Crim. P.

(* * * if anything material to either party is omitted from the record on appeal by error or accident * * * the District Court, either before or after the

record is transmitted to the appellate court * * * on a proper suggestion or on its own initiative, may direct that the omission * * * shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the District Court. * * *)

It is this 28th day of May, 1958,

ORDERED, that the motion be, and it is hereby, granted;

AND IT IS FURTHER ORDERED that the Clerk of this Court shall certify and transmit to the United States Circuit Court of Appeals for the District of Columbia at the expense of the United States a supplemental record on appeal as follows:

1. Volume 1, pages 1 through 46 of the transcript of proceedings.

/s/ Luther W. Youngdahl
JUDGE

Copy of this order sent this 28th day of May, 1958, to Attorney for defendants, Wesley S. Williams, 620 Fifth Street, N. W. Washington, D. C.

/s/ Walter J. Bonner
Assistant U. S. Attorney.

Since the counter-designation was concerned in its entirety with the matters now urged upon the Court and since the appellee advised both the Trial Court and this Court that a consideration of the matters contained in the supplemental record were material to an adjudication of the appeal, this counsel takes the position those matters were before the Court for consideration. Further, present counsel is of the belief an opinion concerning these matters was required in this cause.

Respecting the matters urged in support of the motion to continue or to grant change of venue it is apparent the printed remarks and those sent to the public through the airways constituted a deliberate, vociferous and violent attack upon the character and integrity of judicial proceedings in this District; and this attack included both Trial and Appellate Courts.

The key proposition in Toledo Newspaper Co. v. United States, 247 U.S. 402, 62 L. Ed. 1186, was this publication tending and intending

to provoke public resistance to a decision of the Court established the judicial right to initiate summary contempt proceedings.

Present counsel is of the opinion the lower Court and this Court should have sua sponte, and vigorously, made meticulous inquiry into the truth of such matters and into the extent to which they had, as per the intention of one of the authors, inflamed or aroused the public.

It cannot be said that if as was desired, these publications had convinced prospective jurors that the guidance in a criminal trial supplied and ordered by a trial judge was part of a design to favor criminals; and that irrespective of the Court's activities, or the efforts of defense a verdict of guilty was required in order to uphold the purity and efficacy of our laws that a fair and impartial trial could ensue.

In the opinion of present counsel this conduct was perilously close to constituting the criminal offense of obstructing justice, and the appellants assert that the failure below to inquire into the matter or to permit any inquiry concerning it amounted to an abuse of discretion by reason of an arbitrary, capricious and unreasonable series of rulings.

This is the more apparent from the discussion between Court and counsel at (R. 167, 168) relative to requiring the United States District Attorney to file answers to the motions, and the observations of the Court that ordinarily he would conduct a hearing on the matters, and the final observation of the District Attorney that it was not the policy of his office to file formal opposition in at least 50% of the cases coming before the Court below.

This Court has stated that the rule in such cases is to make careful judicial inquiries before a final ruling. See: Yates v. United States, 225 F. 2d 146, 164 CCA 9: 1955.

Counsel has found no case where allegations as serious and substantial as those advanced below in support of appellants' motions, which came before the Court sans any denial; and concerning which the movants had present and before the Court the authors of the remarks and each and

every of the media of publication was dismissed adversely to movants after such cavalier consideration the Trial Court saw fit to afford the matter.

Exhaustive citation of authority would be superfluous here. The real question is: in the exercise of its own duty respecting procedure below does this Court sanction and approve the procedure adopted by the trial Court in this cause.

As To Qualification Of Jurors

Since a person must be a "good and lawful person" to qualify as a juror and since the making of a bet is as criminal as taking one (D. C. Code 1950 Edition 11-1417, and 22-1508 respectively) it was apparent to the trial Court after the entire panel from three Courts had indicated there was strong reason to believe they were habitual gamblers that a careful inquiry was indicated with respect to the character, partiality, and integrity of the jurors summoned that it could not be casually determined that there was no need to inquire, nor to permit inquiry into the backgrounds and possible sources of bias and prejudice existing in the minds of such persons.

It was further apparent that those summoned were not in any event, by their own confession, good and lawful persons and the reasons for inquiring into the qualifications of the Trial jury were equally forceful respecting the qualifications of the Grand Jury.

In Turner v. State, 157 S. W. 67, 68, 128 Tenn. 27, Ann. Cas. 1914D 693, it was said respecting the very matter raised below by these appellants - and this case has not been reversed nor overruled:

> Criminal Action for violation of state liquor laws. - During selection of the jury it developed that one juror believed the liquor law should be enforced in rural sections but not in the city. The court then interrogated and decided the juror was qualified notwithstanding objection of the defendant.

The question to be determined, is whether the juror was competent. This must be settled in accordance with the following principles:

Our forms of impanelment, both of grand and petit jurors, recites that the jurors be "good and lawful men." This is no unmeaning phrase. (Emphasis by Court). It comes to us from remote times, as far back as the statute of 3 Hen. VIII., ch. 12. That statute in terms applied to grand juries, but was also construed to cover the case of trial juries as well. 2 Hist. P.C. 156, 265; 5 Bac. Abridge 313. It has also been recognized and repeated in our statutes and decisions. Shan. Code, sec. 5804; Neely v. State, 4 Baxt. (Tenn.) 180; Knights of Pythias v. Steele, 107 Tenn. 1 and 14, 63 S.W. 1126; (30) Griffith v. Wilson, 101 Tenn. 612, 49 S.W. 736. At the common law the phrase was "liberi et legales homines." The word "liberi" in strictness imported freeholders' but it was said: "Liber homo is not only one who hath freehold land, but that hath freedom of mind, and stands indifferently, no more inclining to the one than the other." 5 Bac. Abridg. 348. Again: "According to the rule expressed in the English of those days: 'He ne es othes worthe that es enes gylty of oth broken.'. Bracton, lib. 10, tr. 1, ch. 19". The same thought is expressed in our statutes, in the description of jurors, as men "esteemed in the community for their integrity, fair character, and sound judgment." Shan. Code, sec. 5801. Such only are to be appointed for service in court, and so great is the solicitude which the law feels on this subject that it is further provided that in case the authority vested with the power of appointment shall fail to make the appointment or those nominated fail to attend, "the court shall designate other good and lawful men (emphasis by Court) and direct the sheriff to summon them as jurors," section 5804, and that the sheriff in summoning such jurors shall be guided by the same principle (section 5810) and to make even more fully secure the high character of the jury, when finally constituted as a tribunal for the trial of rights, it is provided that the judge presiding may discharge from service any juror who does not possess the requisite qualifications and may discharge him "for any other reasonable or proper cause, (section 5818). The juror should be as impartial as the judge himself.

These are the requirements of the common law, as well as of our modern statutes and decisions, and by our constitution the duty is imposed on this Court,

> and upon all of the judges of the State, to see to it that trial by jury shall remain inviolate (Const. art. 1, sec. 6) and that men shall be tried by impartial juries, (Id. art. 1, sec. 9). It has been often held that the constitution means that the right of trial by jury shall be maintained in its purity and integrity as at common law. We have seen what the common law requires; also that our statutes and decisions require the same.
>
> Now is a man who made on his voir dire answers such as Sullivan made a "good and lawful man", an impartial man, and a good citizen? We say "No". He believes according to his replies, that as to the special crime charged in the indictment the law should be enforced in Shelby County outside of Memphis, but not in Memphis, which is saying, in other words, that he believes in an unequal and partial enforcement of the law, favoring one portion of the people of his county, and discriminating against another portion. (emphasis by counsel) Such a man has not the qualifications of impartiality which the common law and our statutes demand, and is not competent to sit on a case involving the crime as to which he confesses such principles of conduct.

And see

In the instant cause the bias and partiality of the entire panel respecting the statute, violations of which were the entire case, was manifest, undoubted, and one might add shocking.

What then was required by way of permitting a voir dire examination on this subject?

In Bailey v. United States, 53 F. 2d 982, 983, 984 - CCA 5; 1931 (not reversed) it is said of a similar matter:

> (204) * * * It would be promotive of the fairness of the trial for the accused and their counsel to have further opportunities than, in the circumstances disclosed, was afforded by the answers to the statutory questions, to discover the state of mind of prospective jurors in regard to the issues to be tried, whether they were indifferent between the parties, or were biased or prejudiced as to result of their relations to adversaries of the accused in the trial, or of their

> membership in an organization engaged in promoting the enforcement of criminal laws charged to have been violated by the accused, or of their having opinions as to the guilt or innocence of the accused based upon reading newspaper accounts of previous trials of the accused or their alleged associated on similar charges. The answers of prospective jurors as to such matters, which might have the effect of unduly influencing them, and their manner and demeanor while under examination, would do no more than furnish such evidence of their associations or connections and of their state of mind with reference to the issues to be passed on as the accused and their counsel, in the circumstances disclosed, reasonably might ask to have the benefit of and be enabled to exercise intelligently the right of challenge, either for cause or peremptory. * * * the appearance or demeanor of prospective jurors while under examination, might be expected to furnish some information or make impressions which reasonably might influence the accused or their counsel in exercising the right of peremptory challenge. That right is one of the most important of the rights secured to the accused. It should not be required to be exercised before an opportunity is given for such inspection and examination of prospective jurors as is reasonably necessary to enable the accused to have some information upon which to base an exercise of that right. Lewis v. United States, 146 U.S. 370, 378, 13 S. Ct. 136, 36 L. Ed. 1011; Pointer v. United States, 151 U.S. 396, 408, 14 S. Ct. 410, 38 L. Ed. 208; * * *. We are of opinion that, in the circumstances attending the making of the request that prospective jurors be asked additional questions, the court's summary disposition of that request amounted to a failure of the court to exercise its discretion in the matter of examining jurors on the voir dire as to the existence of a disqualifying state of mind. Aldridge v. United States, 283 U.S. 308, 51 S. Ct. 470, 75 L. Ed. 1054, 73 A.L.R. 1203; Neal v. United States, (CCA) 22 F. 2d 52, and had the effect of depriving the accused of a fair opportunity to exercise intelligently their right of peremptory challenge. (emphasis by counsel).

In the instant cause the patent "failure of the court to exercise its discretion in the matter of examining jurors on the voir dire as to the existence of a disqualifying state of mind" was more pronounced and

more prejudicial to appellants' right to a fair trial under due process of law, than was the case in the Bailey matter, supra.

Succinctly, the procedure utilized below operated to produce a condition which ex necessitae abrogated every constituional right appellants enjoyed respecting due process, fair trial, trial by jury and the obligation of the court to direct acquittal in circumstances demonstrating flagrant violation of constitutional rights.

This petition does not, and is not intended to, reflect in maximum detail of exposition or citation, the ultimate possible presentation of the matters urged upon the court. It is intended to establish the necessity of a further hearing in this court, before it is, by this Court, regarded as finally and adequately adjudicated.

Counsel has attached to this petition and made part thereof the following documents referred to in the supplemental record on appeal but not sent up to this Court:

1. Motion for Continuance.
2. Motion for Change of Venue.
3. Motion to require the court to inquire into the qualifications of the present petit jury and into the qualifications of the grand jurors who returned the instant indictment.
4. Excerpts from the local press, not constituting all such articles, portraying the nature and extent of the attack made therein, and over the air, on the procedures of the courts in this jurisdiction respecting gaming violators and rulings on admissability of evidence.

This action is taken in the sincere belief that under the exigencies presently existing as to time it is proper to indicate, specifically, upon what matters counsel depends to support his position.

In the event this court should regard it as being required in the interest of good practice to make a motion for leave to file such documents, appellants pray that the court permit them to file such motion on such later date as the court may deem proper.

Appellants will furnish printed briefs within the time allowed by the rules and submit typewritten briefs to the end the court may more quickly ascertain the position of appellants. The filing of such printed brief, on or before July 14, 1958, will be in identical form and content with this brief - no changes or additions to be made.

CONCLUSION

In consideration of the aforegoing Petition for Rehearing, appellants pray that this Court grant this petition and further Order that appellants have leave to augment and supplement the matter, upon hearing upon the merits, to such extent as is required to meet the exigencies of the entire case on the merits.

Respectfully submitted,

T. EMMETT McKENZIE
Century Building
Washington, D. C.
Counsel for Appellants.

CERTIFICATE

I, the undersigned, as attorney for the appellants, do hereby certify that the foregoing petition for rehearing is filed in good faith and not for purpose of delay.

T. EMMETT McKENZIE

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
v.	:	Criminal No. 307-57
JOSEPH ROBINSON	:	
and	:	
JAMES GASTON,	:	
Defendants.	:	

MOTION FOR CONTINUANCE (R. 164-181)

Comes now the defendant, James Gaston, and moves for a continuance of this cause for an indefinite period of not less than a minimum of one (1) year, on the ground that there exists in the District of Columbia so great a prejudice against the defendant and against his constitutional right to a fair trial under due process of law, that he cannot obtain a fair trial under due process of law free from public bias and prejudice within any time other than that heretofore specified. As further grounds of this motion the defendant alleges as follows:

1. On November 4, 1957, F.B.I., Director, Edgar Hoover, is reported in the local press to have "lashed out against the mounting success of criminal and subversive elements in employing loopholes, technicalities, and delays to defeat the ends of justice".

In the Washington Evening Star this story, in toto, occupied a 4 column head on page 1 of section B.

It was carried in the other metropolitan newspapers.

At this date the actual document is unavailable but defendant will present photostatic copies to the court prior to hearing upon this motion.

2. On November 14, 1957, page 1, 2 columns, Washington Star, declared in part:

MURRAY DECLARES COURTS TEND TO FAVOR CRIMINALS; and also stated Washington Police Chief Robert V. Murray appealed

strongly last night for citizens assistance in reversing an alarming trend on the part of Courts to favor the criminal at the expense of society.

The head of Washington's Metropolitan Force appealed for help to the National Association of Citizen's Crime Committee, honoring him at a dinner at the Sheraton Park Hotel.

These remarks were reported in the entire metropolitan press.

3. On November 15, 1957, the Washington Star at page A 25, in two columns reported that the National Association of Citizens Crime Committee scored court decisions tending toward the unjustifiable discharge and release of the guilty.

This report was carried in the entire metropolitan press.

On November 21, 1957, The Washington Post and Times Herald in a screaming headline running the entire space of page 1, said:

"Restrictions Ruin Police War on Gambling, says Lutz".

Lutz, is Deputy Police Chief Clarence H. Lutz; and further appearing on page 1 of said paper on said date, appeared this:

"his (Lutz's) vehement remarks drew a second from United States Attorney Oliver Gasch. The attorney blasted the enfeebling effects he said recent court decisions have had on local law enforcement." See Exhibit "A".

These remarks were duly reported in the remainder of the metropolitan press.

4. On November 23, 1957 Representative Davis, D. Ga., was reported to have stated, Washington Post, page B 1 to have said that Chief Murray's charge there was an alarming trend on the part of the courts to favor the criminal at the expense of society warranted congressional inquiry.

These remarks were reported by the remainder of the metropolitan press.

5. On November 24, 1957 the Washington Post, page B 4 reported that Deputy Chief Lutz and District Attorney Gasch intended to ask Congress to correct "a mechanical rule on time alone" which had been promulgated by the courts in hindrance of efforts to combat crime.

6. On December 19, 1957, Washington Star, page a 23, Deputy Police Chief Edgar E. Scott, likened the "threat" of recent court decisions in several key criminal cases to the dangers of communism.

"Undermining the power of the courts and weaking the prestige of law enforcement agencies are prime targets for communistic forces operating to overthrow the government", the police executive said. "In this respect, the Mallory decision and other restrictive opinions of the appellate courts are disastrous in their effects upon law enforcement and the clearance of crimes." See defendant's exhibit "B" for a detailed account of this person's hysterical allegations.

On the same date, the Washington Post at page C 15 reports this official as adding the courts have come "perilously close to the point where the rights of the public are given no consideration." Exhibit "C".

7. On December 13, 1957, at page A 29, the Washington Star reported that Lutz had said "My reason for making those statements (supra) was to find out if Washington citizens want the conditions to continue to exist.

"An aroused citizenry can get things moving".

The head of the story is "Lutz had Hoped to Stir Citizens." Exhibit "D".

These references do not encompass each and every remark made by the persons referred to supra and reported in the local press.

The complete file will be available on hearing of this motion.

8. The Washington Post and Times Herald has reported circulation of 390,649 copies; and produces three separate editions, daily.

The Evening Star has reported circulation of 254,992 and produces three separate editions daily.

The Washington Daily News has reported circulation of 178,491 and produces three separate editions daily.

The Washington Edition of the Afro American has reported circulation of 34,000.

9. There are four television stations in this district each reporting news events throughout the day and which operate approximately 20 hours daily.

There are 19 radio stations in the area reporting news events. Some stations are on the air 24 hours per day - others for shorter periods.

10. It is certain that the news coverage of the matters herein referred to above, by press, television and radio has saturated the district with detailed information relative to the subject matter.

11. The complaints are made by law enforcement officials responsible to the District of Columbia government - primarily; and, more importantly by law enforcement officials responsible to the Department of Justice, as part of the executive branch of the federal government; and this department initiates the prosecution and represents the United States in the instant prosecution.

12. This flood of publicity asserts that trials in this district are conducted to favor the aims of communism - to debase the rights of the virtuous segment of society - to confer immunity upon the criminal element of society - by courts deliberately and wilfully betraying alleged "rights" of the populace.

13. In one aspect it declares its purpose to "stir up" the populace to revolt against such judicial behavior.

14. There has been no forthright charge of misfeasance, malfeasance of non feasance in office; nor any courageous effort to seek relief through impeachment.

All that is asserted is that decisions and opinions which have led to acquittals indicate a judiciary bent upon deprivation of undefined "rights" of the public.

It is not asserted that there was a denial of the constitutional right to fair trial under due process; but it is covertly proposed that due process under constitutional guarantees is in itself inherently evil; - pro-communistic; - a boon to crime; and a part and parcel of a judicial plan to subvert justice.

15. That such exhortations from persons of the prominence of those mentioned, supra, have no effect upon the public mind and conscience is a tenet which lacks support in toto.

16. The ultimate result has been to bring about a climate of mental confusion - to instill in the minds of jurors and of the citizenry the belief and opinion that in a judicial trial of an indictment in this district truth and justice are found in the testimony and accusations of police and prosecuting attorneys, only; and that efforts of defense counsel, and decisions of courts are technicalities, loopholes, and mechanical trivia utilized by such persons and institutions to defeat and obstruct the true aims of justice.

No fair trial under due process of law can be obtained in a judicial district thus "conditioned" and brain-washed.

17. To quote again from the Washington Post and Times Herald of November 25, 1957, Editorial page:

"Courts subjected to intemperate criticism from policemen and prosecutors who seem to have forgotten that justice and not mere punishment is their essential business. The burden of their complaint is that the courts have been overscrupulous in respecting the rights of defendants as though these were somehow in conflict with the interests of society."

In Delaney v. United States, C.C.A. 1, 1952, 199 F. 2d 107, 111, 113, the court said in part:

> The newspaper publicity was characterized by flamboyant, front page headlines in large, heavy type, covering colorful feature stories emphasizing the more striking aspects of the testimony. This was supplemented by radio and television exploitation of the same material. * * *.
>
> It is fair to say that, so far as the modern mass media of communication could accomplish it, the character of Delaney was pretty thoroughly blackened and discredited as the day approached for his judicial trial on narrowly specified charges.
>
> * * * as stated by Mr. Justice Jackson, concurring in Krulewitch v. United States, 1949, 336 U.S. 440, 453, 69 S. Ct. 716, 723, 93 L. Ed. 790: "The naive assumption that prejudicial effects can be overcome by instruction to the jury, * * * all practicing lawyers know to be unmitigated fiction." * * * One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspection perception of his own mental processes, that he may confidently exclude even the unconscious influences of his preconceptions as to probable guilt, engendered by a pervasive pre-trial publicity. * * *
>
> (2) If all this material had been fed to the press by the prosecuting officials of the Department of Justice, we think the appellate court would have had to say that the denial of a longer continuance was an abuse of discretion. (Underscoring supplied).

And see, Opinions of Curran, J.; and Tamm, J., in United States v. Carper and Taylor, 836, 52.

Wherefore, the premises considered, defendant prays that he be granted a continuance in this cause to a date not preceeding the fifteenth day of January, 1959.

Respectfully submitted,

/s/ T. Emmett McKenzie,
Counsel for defendant Gaston.

Service acknowledged for the United States of America this 7 day of January, 1958.

/s/ Oliver Gasch

MOTION FOR CHANGE OF VENUE (R. 164-181)

Comes now the defendant, James Gaston, through counsel, and moves the Court for an Order transferring this cause from the United States District Court for the District of Columbia to another United States District Court on the ground that there exists in the District of Columbia so great a prejudice to the defendant and so great a prejudice against his right to a fair trial under due process of law that he cannot obtain a fair and impartial trial in this District.

In support of this motion the defendant invites the attention of the Court to the points and authorities attached to and made part of his motion for continuance; all of which are incorporated herein by reference.

Respectfully submitted,

/s/ T. Emmett McKenzie,

Century Building
Counsel for Defendant Gaston.

Service acknowledged this 7 day of January, 1958.

_____
U.S. District Attorney.

MOTION TO REQUIRE THE COURT TO INQUIRE INTO THE QUALIFICATIONS OF THE PRESENT PETIT JURORS AND INTO THE QUALIFICATIONS OF THE GRAND JURORS WHO RETURNED THE INSTANT INDICTMENT (R. 185-206)

Comes now the defendant James Gaston, through Counsel, and in support of his motion alleges as follows:

1. Title 11, Section 1417, District of Columbia Code states that no person shall be competent to act as a juror unless he meets certain requirements one of which is that the juror must be "a good and lawful person."

2. The Jury Commission for the District of Columbia and the District Court each utilize a printed questionaire to elicit information from prospective jurors. This document requires that each prospective juror state whether he has been arrested or convicted of a crime, but does not inquire further into possible criminal activities.

3. On Sunday, January 5, 1958, the Metropolitan Daily paper carried a dispatch quoting Deputy Police Chief Clarence H. Lutz asserting that "Half of Washington Gambles. That's the estimate of Deputy Police Chief Clarence H. Lutz, and he ought to know. Lutz is head of the Metropolitan Police Department's Morals Division."

There is no reason to doubt the substantial accuracy of the conclusions reached by this emminent authority who has commanded the Morals Division since 1951.

4. Title 22, Section 1508, District of Columbia Code, 1951 Edition, provides that it shall be unlawful for any person to purchase, possess, own or acquire, any chance in a lottery or to make or place a bet or wager.

5. A person who violates Title 22, Section 1508 is not a good and lawful person as required by the Code and his moral right to serve as a juror is qualified by his actual character and not by his success in being able to avoid detection in flagrante delicto with attendant conviction.

6. It must be accepted, per Deputy Chief Lutz's estimate, that at least one half of the jurors both grand and petit who have been or who are about to become concerned with this cause are not qualified to serve as jurors. It is certain that no proper and adequate effort was made to determine whether or not they were engaged in criminal activity, and the defendant is entitled to knowledge of their status in that respect.

To require the defendant to delve into this matter on his voir dire examination would subject him to the hostility of the entire panel because of his affrontery in probing, publicly, into such activities; and further, the jurors would have the right to decline to answer such a question under

such circumstances under the right granted them by the Fifth Amendment to the Constitution of the United States against self incrimination.

7. Further, it is exceedingly doubtful that jurors who are bettors are capable of affording an alleged gambler a fair and impartial trial free from bias and prejudice; for the disgruntled losers, eager as they may be to place a wager, nevertheless consistently nourish a feeling of resentment against the bookie who has won their funds.

WHEREFORE, the promises considered, the defendant prays that this cause be held in abeyance until

1. A proper judicial inquiry is made to determine whether any of the persons on the aforesaid Grand Jury are guilty of any of the offenses proscribed in Section 22-1508 supra, and

2. Whether any of the members of the present Petit Jury panel are persons guilty of acts prescribed by said section of the Code, and

3. That no such persons be permitted to be concerned in any manner as jurors in this cause.

/s/ T. Emmett McKenzie
The Century Building,
412 Fifth Street, N. W.,
Washington 1, D. C.

Counsel for Defendant Gaston.

Service Acknowledged For The
United States of America, this
9th day of January, 1958

/s/ Oliver Gasch
United States Attorney for the
District of Columbia.

[EXHIBIT "A"] 25

Restrictions Ruin Police War on Gambling, Says Lutz

The Weather
Today—Mostly sunny and cool; high, 55. Clear and cool tonight; low, 35. Friday—Fair and cool. Wednesday's temperatures: High, 59 degrees at 1:30 p. m.; low, 45 degrees at 6:45 a. m. For details turn to Page 32.

The Washington Post and Times Herald

FINAL

80th Year .... No. 351 Phone RE. 7-1234 THURSDAY, NOVEMBER 21, 1957 WTOP Radio (1500) TV (Ch. 9) FIVE CENTS

Lutz Says Restrictions Foil War on Gambling

By Alfred E. Lewis
Staff Reporter

Deputy Police Chief Clarence H. Lutz said yesterday his decision to retire as head of the morals division next April was dictated by a conviction that his men have been hobbled by the courts in their efforts to cope with a $1 million daily gambling business in Washington.

"When I reached the point where I couldn't do the job the public expects me to do," the 54-year-old veteran of 32 years on the force said, "I told myself it was time to get out of harness."

Lutz delivered a blunt valedictory at a meeting of the Washington Board of Trade's Public Protection Committee in O'Donnell's Restaurant.

His vehement remarks drew a second from United States Attorney Oliver Gasch. The attorney blasted the enfeebling effects he said recent court decisions have had on local law enforcement.

Lutz said he took reluctant command of the morals division in 1951, with Police Chief Robert V. Murray's assurance that the assignment was temporary.

It was hard to get good men to serve in the division, Lutz said, because of the nature of the work. During his tenure, the police attitude toward the assignment has changed radically for the better.

"I have no trouble getting men to work in the division," Lutz explained proudly. "They consider it a stepping-stone in the department because they know I do not hesitate to promote a man in recognition of a job well done."

Lutz said morale has never been higher than it is now in the division as a whole and that narcotics traffic, with the aid of new laws, and commercial vice (prostitution and perversion) has been almost eradicated.

"When it comes to gambling, however, it's a different

See LUTZ, A21, Col. 1

LUTZ—From Page 1

Lutz Says Court Rulings Make It Time to Retire

story," Lutz told the businessmen.

"My men tell me there's about $1 million a day spent here in gambling—six days a week. That's $6 million a week. You businessmen don't know it, but your employes are gambling this money and unless you've got a good cost-accounting system you might be surprised to find you've got financial leaks you know nothing about."

"We get calls every day about gambling and our files are filled with letters, many of them pinpointing activities we are helpless to wipe out. We do what we can about all of them, but it's not enough.

"We investigate. We think we've probable cause for an arrest and we go to the United States Attorney's office for a warrant. They tell us that what used to be considered probable cause is no longer probable cause and they send us back after more evidence, which we cannot get."

Lutz said the original complainants want to know why something isn't done and "they insinuate that we are crooked."

"I can't do anything about it because the courts have gradually made it harder for us to make these cases, and I don't want to remain in a position where I'm suspected of not doing my duty," Lutz concluded.

Gasch followed Lutz' remarks with the observation that he didn't "blame [illegible] for being discouraged. I hate to see a man of his zeal, integrity and knowledge leave the force. He's a good, honest guy and I hope something will turn up to make him change his mind (about retiring)."

With reference to the recent Supreme Court decision in the Mallory case, Gasch said it was "the blackest day of my life when I had to ask (the court) to dismiss the case against Mallory, a man that had confessed a crime (rape) so vicious the jury recommended the death penalty. Yet the man is free to walk the streets of Washington or any other community."

The Mallory decision was that the suspect had been too long in custody between his arrest and his arraignment for his confession to be used in evidence against him.

The Public Protection Committee followed both talks with unanimous adoption of a resolution that steps be taken to seek clarifying new legislation in the next Congress.

The Evening Star

Local—Suburban News
Radio-TV—Comics

TON, D. C. THURSDAY, DECEMBER 19, 1957 **** A-23

Criminal Case Reversals Seen Peril to Public

Chief Scott Decries 'Leniency' of Courts Toward Defendants

Deputy Police Chief Edgar E. Scott last night likened the "threat" of recent court decisions in several key criminal cases to the dangers of communism.

His references for the most part were to the Mallory case, the Durham case, the Watson case, all involving conviction reversals by the Supreme Court majority, or the speed of the trials.

Chief Scott, the head of District detectives and holder of more than 100 commendations, told the Federation of Businessmen's Associations that the reversals show quite clearly that "the interest in the rights of the individual has been extended perilously close to the point where the rights of the public are given no consideration."

"Undermining the power of the courts and weakening the prestige of law enforcement agencies are prime targets for communistic forces operating to overthrow a government," the police executive said. "In this respect, the Mallory decision and other restrictive opinions of the appellate courts are disastrous in their effects upon law enforcement and the clearance of crimes."

Labels Bill Important

"Next to communism," he continued, "and the national defense, passage of the Keating bill will be the most important thing to be considered by Congress next year."

Representative Keating, Republican of New York, has proposed legislation which says, among other things, that confessions otherwise admissible in court are not to be thrown out solely on account of the time element of arraignment, one of the bones of contention between the courts and District

"I ask you," he said, "if you know there have been dozens of persons who are charged with serious criminal offenses and sometimes a whole series of criminal offenses who have walked free in this community on the grounds of insanity?"

Cites Durham Case

In that connection he referred to the Durham case, the issues of which were based on a plea of insanity.

In effect, Chief Scott said the reversal of Durham's conviction empowered psychiatrists to act as judge and jury.

The veteran policeman, however, appeared to be particularly concerned about the Mallory decision.

"It goes so far in the direction of leniency for the criminal that it seems to disregard the rights of the law-abiding public, the family of the deceased and the victim of the rapist, and puts handcuffs and shackles on law enforcement in the District," he declared.

Pictures Consequences

The Mallory reversal, he continued will have the following consequences:

1. "It excludes confessions voluntarily made and otherwise admissable for the reason of the (arraignment) time element alone.

2. "In a relatively short time, thousands of guilty persons would go free.

3. "Innocent persons in great numbers would, of necessity, have to be arraigned (because of the time element) and the stigma of a police record placed against them unless there is a reasonable time to clear them by interrogation and investigation before arraignment.

4. "The professional criminal, or the one who plans his crimes (uses masks or slays the victim) so there will be no witnesses, will be the one protected by the decision.

5. "A criminal committing multiple offenses will have to be arraigned on the first offense for which he is caught and all of the others (thereby warned) will go uncleared with no recovery of property.

6. "Multiple defendants, therefore, could not be prosecuted.

7. "If criminals, who were operating in other States, are caught in the District . . . and arraigned on local charges, the cases occurring in other jurisdictions . . . would likely go unsolved.

Crime Increase Feared

8. "State courts may feel bound to comply with the Supreme Court's views in the Mallory decision if a remedy is not found. A rise in crime is sure to follow in the States under these conditions.

9. "Persons making 'hoax confessions' would have to be arraigned, whereas with sufficient time to investigate, these persons would be cleared.

10. "Great pressure is placed on investigative officers. Their health is affected and it will be harder to get good men to enter law enforcement under this type of restriction.

11. "Insurance and bonding companies will increase their rates when the police are unable to clear multiple cases and recover property for the citizens."

[EXHIBIT "C"]

THE WASHINGTON POST and TIMES HERALD
Thursday, December 19, 1957

Police Official Lashes Court 'Leniency Trend'

By Alfred E. Lewis
Staff Reporter

Recent decisions of United States appellate courts have extended the rights of the individual "perilously close to the point where the rights of the public are given no consideration," Deputy Police Chief Edgar E. Scott, declared last night.

Speaking at a meeting of the District Federation of Businessmen's Associations, Scott sharply criticized the Supreme Court ruling in the Mallory case, in which the Court upset the rape conviction of Andrew B. Mallory on the grounds that he did not receive a speedy arraignment.

"If this trend to leniency as exemplified by the Mallory decision, is not curbed and a remedy found, the result will be disastrous to low enforcement in the District of Columbia and, ultimately, in the entire country," Scott declared.

Among the far-reaching consequences that may result from the decision, he said, are that "thousands of guilty persons will go free"; innocent persons "in great number" would have to be arraigned because there would be no time to clear them by interrogation and investigation; a criminal committing multiple offenses will be arraigned on the first offense for which he is caught and "all of the others will go uncleared," and "great pressure" will be placed on investigating officers, making it harder to get good men to enter law enforcement.

"The time has come for the lawful majority to take a stand and make an effort through your Congress to stop this trend," he said. "Never forget, you are the people who will be hurt . . . if these vicious criminals are allowed to go free . . ."

Scott also hit at the Court of Appeals ruling in the Monte Durham case, which greatly broadened the legal interpretation of insanity.

Since the ruling, Scott said, "dozens of persons" charged with serious criminal offenses have gone free, many of whom, at the time of arrest, "talked to police very sensibly and certainly had every appearance of knowing right from wrong and of being of sound mind . . ."

He said he did not share the Court's confidence in psychiatry in the criminal field because it is "not an exact science" and because, in most cases, phychiatrists arrive at differing opinions as to the sanity of the defendant.

Scott said he is convinced that many defendants, perhaps as high as 75 per cent, are now faking insanity in order to escape the consequences of their crimes.

[EXHIBIT "D"]

THE EVENING STAR, Washington, D. C. A-29
FRIDAY, DECEMBER 13, 1957

Lutz Had Hoped To Stir Citizens

Deputy Police Chief Clarence H. Lutz yesterday revealed his motive for complaining, loud and strong, about what he considers lenient court treatment of "big (gambling) operators" in the District.

The Vice Squad-chief recently leveled criticism at the courts for letting criminals get away on technicalities.

Addressing a meeting of the Corrections Conference, a forum affiliated with the Washington Health and Welfare Council, Chief Lutz said:

"My reason for making those statements was to find out if Washington citizens want the conditions to continue to exist.

"An aroused citizenry can get things moving."

He said there is no use in his prolonging the controversy.

When asked what made him think that "half of the people" in Washington are involved in gambling, Chief Lutz said that was a "guesstimate." He added, however, that he had been given that impression by policemen who investigate gambling.

"And I am not talking about poker games or bingo—I consider that recreation," he added.

Chief Lutz was introduced by conference chairman Donald Klemmer, director of the District Department of Corrections. The luncheon was held in the YWCA.

BRIEF FOR APPELLEE

United States Court of Appeals For the District of Columbia Circuit

096

United States Court of Appeals
For the
District of Columbia Circuit

FILED JUN 10 1958

Joseph W. Stewart
CLERK

No. 14,400

JAMES GASTON, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

No. 14,401

JOSEPH ROBINSON, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal From the United States District Court for the District of Columbia

OLIVER GASCH,
United States Attorney.

CARL W. BELCHER,
THOMAS A. FLANNERY,
WALTER J. BONNER,
Assistant United States Attorneys.

Nos. 14,400, 14,401

QUESTIONS PRESENTED

In the opinion of the appellee the following questions are presented:

(1) May the validity of the issuance of a search warrant be raised for the first time on appeal?

(2) Assuming, *arguendo*, that such question may be so raised, was there probable cause on which to base the issuance of the warrant, under the facts and circumstances of this case?

INDEX

Page

Counterstatement of the Case 1

Statutes Involved 6

Summary of Argument 9

Argument:

I. The Validity of the Search Warrant Cannot Be Raised for the First Time on Appeal 9

II. There Was Adequate Probable Cause on Which to Base the Issuance of the Search Warrant 11

Conclusion 12

TABLE OF CASES

Bell v. *United States*, ... U.S. App. D.C. .... (No. 13,684; decided January 23, 1958) 11

Cromer v. *United States*, 78 U.S. App. D.C. 400, 142 F.2d 697 (1944), *cert. denied*, 322 U.S. 760, 88 L.Ed. 1588, 64 S. Ct. 1274 (1944) 9

Smith v. *United States*, 72 App. D.C. 187, 112 F.2d 217 (1940), *cert. denied*, 311 U.S. 663, 85 L.Ed. 425, 61 S. Ct. 20 (1940) 9

United States v. *Herskovitz*, 219 F.2d 881 (2 Cir. 1954) 11

Wyche v. *United States*, 90 U.S. App. D.C. 67, 193 F.2d 703 (1951), *cert. denied*, 342 U.S. 943, 96 L.Ed. 702, 72 S. Ct. 556 (1952) 12

OTHER REFERENCES

26 U.S.C. §§ 4401, 4411, 7262 8,9

F.R. Crim. P. 41(c)(e) 7,8

F.R. Crim. P. 4(b)(1) 7

Title 22, D.C. Code (1951), Sections 1501, 1502, and 1505 6,7

United States Court of Appeals
For the District of Columbia Circuit

No. 14,400

JAMES GASTON, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

No. 14,401

JOSEPH ROBINSON, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeal From the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On March 26, 1957, a five count indictment was filed in the District Court, Counts One through Three charging each appellant with violations of the District of Columbia gambling laws, to wit, Sections 1501, 1502, and 1505, Title 22, D.C. Code (1951), and Counts Four through Five charging appellant Gaston and Robinson respectively, with

failure to pay the special tax required of those engaged in the business of accepting wagers, pursuant to 26 U.S.C. 4411 (R. 145-146). On March 29, 1957, each defendant entered a plea of not guilty (R. 147-148). Trial by jury commenced on January 13, 1958, and on January 15, 1958, appellants were found guilty as indicted (R. 1, 149).

On February 21, 1958, appellants were sentenced to serve a term of imprisonment of one to three years on Count One; one year on Count Two; one year on Count Three, the sentences by the counts to run concurrently with each other. In regard to Counts Four and Five, the Court imposed a fine of one thousand dollars on appellants Gaston and Robinson respectively, after which the Court suspended payment of the fines (R. 151-152). This appeal followed.

At the trial five witnesses testified on behalf of the Government (R. 4, 22, 31, 54, 114). No testimony was offered on behalf of appellant (R. 136-137).

On January 29, 1957, at one p.m., Officer Tarver Thomas, attached to the gambling squad of the Metropolitan Police Department, was on observation duty in the vicinity of Georgia Avenue and Otis Place; Northwest. At approximately two p.m. he observed the appellant Robinson, who was known to him as a convicted numbers operator (Appellants' Appendix 7), operating an automobile north on Georgia Avenue (R. 5). Robinson was observed to park his automobile and enter 819 Otis Place (R. 5). A few minutes later he reappeared, returned to his car, and drove off. The officer followed him (R. 5). During the period that followed, Officer Thomas observed Robinson make three more stops at different addresses (R. 5-6). On leaving 1528 - 19th Street, Northwest, Robinson placed a brown envelope in his inside coat pocket, and on stopping at 1340 Vermont Avenue, Northwest, a man came from the basement of that address and handed Robinson another brown envelope (R. 5-6). Robinson then drove off and proceeded to make four additional stops at different addresses (R. 6). Officer Thomas then followed Robinson to the 200 block of Gallatin Street, Northwest where the former parked his car, got out, and met a taxi (R. 6). A person

(later identified as appellant Gaston) stepped from the cab, and the two appellants entered the premises at 215 Gallatin Street.

On January 30, 1957, Officer Thomas again kept Robinson under observation, and again saw Robinson proceed in the same manner and to virtually the same addresses as he had on the previous day (R. 8-10). About two thirty-five p.m., Thomas broke off his observation of Robinson and proceeded to the 200 block of Gallatin Street (R. 10). He observed the same man (later identified as Gaston) leave a cab and enter premises 215 Gallatin Street (R. 10). At approximately three p.m., Officer Thomas saw Robinson enter the same premises (R. 10).

Around six p.m., the officer went to the rear of the premises where he heard a radio playing, an adding machine in use, and the voices of two men (R. 10). Thirty minutes later, Robinson and Gaston left the house, Gaston carrying a large brown bag, and drove off together (R. 10). Thomas followed appellants to 14th and Cochran Street, Northwest, where Gaston, carrying the same brown bag, entered a gas station (R. 10).

The following day, Thomas again watched Robinson (R. 11). Once again the officer observed Robinson make the same set of sorties as on the two previous days (R. 11-12). About three p.m. Thomas saw Robinson enter the front door of 215 Gallatin Street carrying a large paper bag (R. 12) which the officer has seen in his possession at an earlier stop the same day (R. 12).

At approximately six p.m., Thomas again proceeded to the rear of the premises. There he heard the "sound of an adding machine and the jingling of money" (R. 12). Through a window, he observed the appellants (R. 12).

On February 1, 1957, Officer Thomas went to the United States Commissioner and secured a search warrant for premises 215 Gallatin Street (R. 13, Appellants Appendix 5, 6, 7) and an arrest warrant for appellant Robinson and another person described as "John Doe #1 (colored, male, 43 years old, 5'9", 160 lbs., medium brown skin) (R. 13, Appellants Appendix 7-12), later identified at trial as

appellant Gaston (R. 22). The affidavit in support of the warrants contained substantially the same information as the testimony of Officer Thomas, recited above (R. 3-14). The same day, Thomas and his brother Officers proceeded to the premises in question to execute the warrants (R. 13).

Lieutenant Scott E. Moyer, Corporal Jack E. Lockhart, and Officer Thomas went to the rear of the premises at 215 Gallatin Street (p. 23). Corporal Lockhart knocked on the screen door, received no response and knocked again (R. 13, 23, 32). Lockhart called, "Police, we have a search warrant for lottery violations". (R. 23). Still, there was no response (R. 13, 23). This time, Lieutenant Moyer called out, "This is the police. Come on, open up the door" (R. 23, 32). No one answered (R. 13, 23, 32). Corporal Lockhart then pulled open the latched screen door, and Officer Thomas forced the inner basement door open with his shoulder (R. 23, 32).

As these three policemen entered the premises, they saw appellant Robinson standing in the room, and appellant Gaston seated at a table containing adding machines and numbers slips (R. 13, 24, 33). Lieutenant Moyer, thereupon asked Gaston why he had not opened the door, and Gaston replied "I knew you were coming in anyhow" (R. 24).

During the course of his testimony, Corporal Lockhart stated, that he had recovered a key from Gaston which fitted a toolbox found in the room. The toolbox contained numbers slips (R. 36). He identified a shopping bag taken from the premises, containing among other things, additional number slips (R. 45), and further identified additional evidence taken during the search such as, adding machines (R. 42), run down tapes and adding machine rolls (R. 43-44). Appellant Gaston admitted ownership of the property (R. 14, 15, 24), but appellant Robinson, according to Lieutenant Moyer, ". . . had no statement to make [concerning the gambling devices and equipment in the basement] or any statement concerning his occupancy of the house (R. 24).

Lieutenant Moyer also testified, that in the front room of the basement he found a coat with a ring of keys in

it (R. 24), which appellant Robinson admitted to be his property (R. 24). The Lieutenant then took the keys upstairs to the front door and tried several of them. One of the keys opened the front door (R. 24). The key was received into evidence without objection (R. 26).

During the time that Officers Moyer, Lockhart, and Thomas were attempting to gain entry at the rear of the premises, Captain Thomas and Sergeant William D. Foran went to the front door of the house and knocked on the door (R. 55). A lady answered, to whom Sergeant Foran identified himself and his Captain as police officers, stating that they had a search warrant for the premises (R. 55). These officers then proceeded into the basement, where Officer Foran observed the appellants along with the other officers who had already entered (R. 56).

While on the stand, Sergeant Foran testified that the numbers game is a lottery (R. 57), and explained to the Court and jury the general workings of the numbers game (R. 57-62). Following this testimony he was acknowledged by the Court to be a qualified expert in numbers game operations (R. 61-62). This officer was then presented with items seized in the basement premises at 215 Gallatin Street, and identified them as numbers game paraphernalia (R. 62-64, 67-78). The Sergeant concluded his direct examination by stating that he and his brother officers had concluded, after examining the fruits of the seizure, "that there were seventy writers turning into this operation", and further determined "that nine hundred and some odd slips were slips that appeared to be current work" (R. 78).

The Government's final witness, was Henry T. McNamara, the custodian of records in the office of the District Director of Internal Revenue, Baltimore, Maryland (R. 114-115). Mr. McNamara testified, that he was custodian of records for those persons engaged in the business of accepting wagers, who are required by law to pay a special tax (R. 115). He further testified, that he had examined those records and that appellants, prior to indictment, had failed to file Form 11-C, the form applicable and required under such circumstances (R. 115-116).

STATUTES INVOLVED

Title 22, District of Columbia Code (1951 Edition) § 1501 provides

> *Lotteries—Promotion—Sale or possession of tickets.*—If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery, or policy, or shall, for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than $1,000 or be imprisoned not more than three years, or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima-facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery."

Title 22, District of Columbia Code (1951 Edition, Supp. VI) § 1502 provides:

> *Possession of lottery or policy tickets.*—"If any person shall, within the District of Columbia, knowingly have in his possession or under his control, any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing, current or not current, used or to be used in violating the provisions of sections 22-1501, 22-1504, or 22-1508, he shall, upon conviction of each such offense, be fined not more than $1,000 or be imprisoned for not more than one year, or both.

For the purpose of this section, possession of any record, notation, receipts, ticket, certificate, bill slip, token, paper, or writing shall be presumed to be knowing possession thereof."

Title 22, District of Columbia Code (1951 Edition, Supp. VI) § 1505 provides:

Permitting gaming table or device to be set up.—

"(a) Any house, building, vessel, shed, booth, shelter, vehicle, enclosure, room, lot, or other premises in the District of Columbia, used or to be used in violating the provisions of section 22-1501 or 22-1504, shall be deemed "gambling premises" for the purpose of this section.

(b) It shall be unlawful for any person in the District of Columbia knowingly, as owner, lessee, agent, employee, operator, occupant, or otherwise, to maintain or aid or permit the maintaining of any gambling premises.

* * * * *

(d) Whoever violates this section shall be imprisoned not more than one year, or fined not more than $1,000, or both, unless the violation occurs after he has been convicted of a violation of this section, in which case he may be imprisoned for not more than five years, or fined not more than $2,000 or both."

Rule 4(b) F.R. Crim. P. provides in pertinent part:

(1) *Warrant.*—The warrant shall be signed by the commissioner and shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available commissioner.

Rule 41(c) F.R. Crim. P. provides in pertinent part:

Issuance and Contents.—A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds

for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched.

Rule 41(e) F.R. Crim. P. provides:

Motion for Return of Property and to Suppress Evidence.—A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

Title 26 U.S.C. § 4401 provides in pertinent part:

(c) *Persons liable for tax.*—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subsection on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

Title 26 U.S.C. § 4411 provides:

Imposition of Tax.—There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

Title 26 U.S.C. § 7262 provides:

> *Violations of occupational tax laws relating to wagering—failure to pay special tax.*—Any person who does any act which make him liable for special tax . . . without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

SUMMARY OF ARGUMENT

1. No motion to suppress the evidence was made prior to trial, nor was any such motion made during the trial itself. The validity of the issuance of the search warrant being unquestioned until this appeal, appellants' contention that the warrant was issued without probable cause, comes too late.

2. Prior knowledge on the part of a police officer as to appellant Robinson's history of illegal gambling activities, his additional knowledge that this appellant was a convicted numbers operator, plus the officer's careful observation of the conduct on the part of both appellants during the period January 29-31, 1957, constituted adequate probable cause on which to base the issuance of a search warrant.

ARGUMENT

I

The Validity of the Search Warrant Cannot Be Raised for the First Time on Appeal

Appellants contend that the search warrant was issued without probable cause. No motion to suppress was made prior to trial as required by F.R. Crim. P. 41(e) (Appellants' Br. 9) nor do appellants complain that opportunity to make such motion in advance of trial did not exist, or that they were unaware of the grounds for such motion. Under these circumstances, a motion by appellants *during* trial would have come too late. *Cromer* v. *United States*, 78 U.S. App. D.C. 400, 142 F. 2d 697 (1944), *cert. denied*, 322 U.S. 760, 88 L. Ed. 1588, 64 S. Ct. 1274 (1944); *Smith* v. *United States*, 72 App. D.C. 187, 112 F. 2d 217

(1940), *cert. denied,* 311 U.S. 663, 85 L. Ed. 425, 61 S. Ct. 20 (1940). And here, the record discloses that no motion to suppress was made at any stage of the trial proceedings. The only objection to the admission of evidence seized *to which any ground was assigned* came from counsel for appellant Gaston, and this in most general terms (R. 38):

> Mr. McKenzie: As to the key obtained by search, I object upon the ground that there was no reason or authority in this person [Corporal Lockhart] to search the defendant Gaston and take anything from his person.

But counsel in making this objection was not contending that the search warrant had been issued without probable cause. On the contrary, he conceded the validity of the warrant (R. 124):

> Mr. McKenzie: I am not challenging on this paper [search warrant] the legality of the search. I am trying to get this paper in evidence for the purpose of showing the investigating officer asked for this warrant and that my defendant is no place named in it.

Counsel's objection, therefore, while general in nature, was apparently based on the fact that his client had not been named in the warrant. It is clear, however, that appellant Gaston *was* named in the officer's affidavit for both search and arrest warrants in conformity with F. R. Crim. P. 4(b)(1) and 41(c) as "John Doe #1 (colored, male, 43 years old, 5'9", 160 lbs., medium brown skin)" (Appellants' Appendix 7-12), and that at trial, he was so identified (R. 22):

> Mr. Flannery: The John Doe that Mr. McKenzie referred to in his questions, now, who was that?
> (Officer Thomas): Gaston.

If appellants had desired to suppress the evidence seized as a result of the search, they were required by F. R. Crim. P. 41(e) to so move before the trial, and to set forth the ground they now raise for the first time on appeal. But

here, "(e)ven at the trial they did not object on this ground . . . It is too late to raise the point now." *United States* v. *Herskovitz,* 209 F. 2d 881 (2 Cir. 1954).

II

There Was Adequate Probable Cause on Which to Base the Issuance of the Search Warrant

Assuming, *arguendo,* that timely objection to the validity of the search warrant had been properly raised below, it is clear that there was adequate probable cause to support its issuance.

> I have known Joseph Robinson, a known and convicted numbers operator, for several years and have had him under observation from time to time since about September, 1952.
>
> Beginning on January 10, 1957, up until about January 29th, 1957, I observed Robinson driving through Lamont Street, northwest, at Georgia Avenue, northwest, practically every day, and on January 29th, 30th and 31st, 1957, followed him over his numbers route, which is outlined in this affidavit (Appellants' Appendix 7).

Thus begins the preamble to the affidavit of Officer Tarver Thomas. It is followed by a summary history of this appellant's dealings in violation of the gambling laws since May, 1947. This history, in turn, is followed by a detailed statement of the officer's observation during the three day period (Appellants' Appendix 8-12), regarding which he also gave testimony at trial (R. 3-22). The essence of these precise observations is set forth in appellee's Statement of Facts, and reflects a pattern of conduct on the part of both appellants which to a "reasonable, cautious and prudent peace officer" could but lead him to conclude that appellants were indeed engaged in illegal gambling activities. *Bell* v. *United States,* U.S. App. D.C. (No. 13684; decided January 23, 1958).

Fortified therefore, with the knowledge of appellant Robinson's past record and what he had observed concerning both appellants in the seventy-two hour period,

Officer Thomas properly presented this information to the United States Commissioner, and received both a search warrant for the premises in question and a warrant of arrest for appellant Robinson by name and appellant Gaston by description. No better basis for the issuance of the warrants could reasonably have been presented, nor stronger probable cause demanded. And aside from the fact that an arrest warrant did exist, "when the officers entered the premises and observed the situation, they were fully justified by the force of surrounding circumstances to feel there was ample probable cause to arrest all persons present", and to conduct the subsequent search of those same persons. *Wyche* v. *United States,* 90 U.S. App. D.C. 67, 69, 193 F. 2d 703 (1951), *cert. denied,* 342 U.S. 943, 96 L. Ed. 702, 72 S. Ct. 556 (1952).

It follows, therefore, that since both the search warrant and the arrests were in conformity with the law the search of the premises and the subsequent search of appellants' persons were legal, and the evidence obtained thereby was admissible.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

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